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## THE RULE OF ELECTION WHERE PRINCIPAL OF AN AGENT IS SUBSEQUENTLY DISCOVERED.

In Mechem on Agency, Sec. 696, it is said to be "a rule of law that an undisclosed principal, when subsequently discovered, may, at the election of the other party, if exercised within a reasonable time, be also held liable upon all simple contracts made in his behalf by his duly authorized agent, although the credit was originally given to the agent under a misapprehension as to his true character."

Then the author speaks of two exceptions to that rule, one being that founded on estoppel in settlement by principal with agent in good faith prior to such election, and the other, where the creditor, after discovery of principal and having the power to choose between him and the agent, distinctly elects to treat the agent alone as the party liable. It is to be noticed, that the rule does not state that election substitutes the principal's liability for that of the agent, but it says the principal may by election "be *also* held liable," and the exceptions are to those things which merely prevent the principal from *also* "becoming liable," all the while going upon the theory that the agent remains liable.

It is to be noticed that reference is only to non-action, or action of which the principal may take advantage, and therefore either acquiescence towards or action against the agent of an undisclosed principal remains governed by the contract status between the original parties. In other words, the rule as above formulated gives to the creditor the privilege of resort "also" to the principal, subject only to certain exceptions in the latter's favor.

Now, if the above is a correct statement of the rule how stands this statement from a Missouri and other cases: "A party who enters into a contract with the agent of an undisclosed principal may, after the principal has been disclosed, proceed either against the agent or against the principal; but he cannot proceed against both, and if he proceeds against one, although unsuccessfully, he cannot thereafter proceed against the other." Sessions v. Block, 40 Mo. App. 569.

We do not take any exception here to the inhibition embracing a mere proceeding, but we will consider, that the court intends to say proceeds *to judgment*, so that whatever in the way of conclusiveness as to election may legally arise shall be deemed to have arisen. What we wish to stress is, that the Mechem rule is that, election adds a new debtor while by the other rule it releases an old, by taking on a new, debtor, if it takes that direction.

In the first place, the latter effect does not appear to rest upon any rule of consideration. The agent is liable because credit is extended to him; the principal is liable because he received the benefit, and should pay under the rule *ex aequo et bono*.

In the second place, the liability of principal is solely for the creditor's benefit and there is no justice in his being put to any peril by reason of any disadvantage at the outset of the transaction.

But let us inquire into the cases in which the latter expression of the rule has been announced. No better illustrations may be found than the Sessions case, *supra*, and that of Barrell v. Newby, 127 Fed. 656, 62 C. C. A. 308, and the authorities they cite.

It is to be said, that both of these cases would have been decided exactly as they were decided, under the Mechem rule and its exceptions. Also so seem the cases cited by the opinions in both cases. Therefore, any extension of that rule was *dictum*.

The Missouri case quotes from Lord Cairns' opinion in Kendall v. Hamilton, L. R. 4 App. Cas. 504, his being the only opinion referring to principal and agent, and himself and all the other Lords basing their ruling mainly upon another consideration.

But Lord Cairns said: "It would be clearly contrary to every principle of justice that the creditor who had seen and known and dealt with and given credit to the agent, should be driven to sue the principal, if he does not wish to sue him, and, on the other hand, it would be equally contrary to justice that the creditor, on discovering the principal, who really had the benefit of the loan, should be prevented suing him, if he wished to do so. But it would be no less contrary to justice, that the creditor should be able to sue first the agent and then the principal, when there was no contract and when there never was the intention of the parties that he should do so." Thereupon the court refers to Priestly v. Fernie, 3 H. & C. (Exchq.) 979, 34 L. J. Eq. 175.

The latter case has been referred to so often in the cases as to be regarded as the source of the election rule, and it is therefore important to examine it.

The Priestly. case was summarized in Maple v. Railroad, 40 Oh. St. 313, as a rule releasing the *principal* "upon the ground of election and upon the additional consideration that the judgment against the agent altered the situation of the principal." The Maple case considered it authority for the conclusion, that a principal should not be released, where a prior judgment had been obtained against him for misrepresentation to a customer of his principal, out of which misrepresentation the cause of action arose, because under those circumstances the agent would have no action over against the principal, and therefore the latter was not affected. The Priestly case said that the agent, generally, would have an action over against the principal whether he paid the judgment or not, and therefore, if the agent were sued to judgment, the principal became thereby released. It is evident that the same cannot be said where the principal has been first sued to judgment.

Rounsaville v. Insurance Co., 138 N. C. 191, 196, referring to the Priestly case and the rule it announced, said: "Convincing reasons are given in support of the principle and it seems to have received the support of the text writers and the courts of this country."

That case, however, gave no reasons whatever for not holding an agent when the principal's liability had been fixed by election, or suit against the principal to judgment.

In Jones v. Insurance Co., 14 Conn. 501, it is said: "If a person deals with another not knowing his agency, when the principal is disclosed, he may pursue the principal, but, if he elects to give credit to the agent he cannot pursue the principal." For this is cited the English cases of Paterson v. Gaudasequie, 15 East. 62; Addison v. Gaudasequie, 4 Taunt. 574, and Beebe v. Robert, 12 Wend. 413, 417.

In Massachusetts the rule appears as secondly above stated, if we may judge from the holding in Weil v. Raymond, 142 Mass. 206, that both principal and agent cannot be sued conjunctively or severally in one suit, though this case shows that this broad ruling was unnecessary.

The Mechem rule appears to be recognized in an older Alabama case, Cleaveland v. Walker, 11 Ala. 1058, as the first exception stated by Mr. Mechem is there applied.

In all of the cases of prior judgment against the agent it was unnecessary to distinguish between prior judgments against principals and therefore a dissection of the rule was not called for. In Codd Co. v. Parker, 97 Md. 319, the question of distinction, if any exists, could have been raised but was not. The court merely enforced the rule, where the principal was first sued to judgment, assuming it to be a strictly technical rule in the form secondly above stated.

The rule, however, seems never to have been so recognized or established, but merely one of estoppel.

It appears in the Priestly case that there were two obligors, bound for two well recognized, but diverse, reasons and this case, thus presupposing, says the one secondly liable cannot be held under certain circum-

stances, not hinting at any release of the party primarily liable.

The contract between the original parties is at the start, like any other contract. Investigation or chance subsequently may aid or be intended to aid the creditor in its enforcement. Discovery of this aid may be wholly independent of any act or wish, or even against the wish, of the primary party. If the aid comes it cannot possibly work to his prejudice, because of any step the discoverer may take or refuse to take.

And, yet, that discoverer is, for the benefit enuring to the primary party as well as himself, put in peril in seeking to avail himself of it. There is certainly no such rule for the primary debtor in the doctrines of principal and surety, maker and indorser, principal and guarantor, as those relations are generally understood. But—is not the agent of an undisclosed principal the principal for the creditor and the agent's principal—the creditor's guarantor to be resorted to at the creditor's election?

See how fatally some of the courts proclaim is the working of this double rule, when they hold, as has been held, that judgment even without satisfaction cuts off the creditor. They concede, that an election is only conclusive upon the facts being known. Therefore we will suppose the creditor first sues the principal, who is financially preferred, and judgment is rendered for defendant. But this is not held to show the creditor was misinformed as to the facts. The agent's contract has, however, been abrogated, because there was a supposedly well advised election.

In the case of Beymer v. Bonsell, 79 Pa. 298, prior judgment against the principal was pleaded but the claim of election was rejected. The court did not distinguish in the way we are urging between principal and agent, but on every principle of justice its decision seems right, as nothing whatever resembling the exceptions stated by Mechem appeared. This rule, as a shield of justice, should not be changed to a sword of injustice, merely because of careless utterances by courts.

## NOTES OF IMPORTANT DECISIONS.

**TORTS—ACTIONS FOR INJURIES IN PRISON.—In the action of Leigh v. Goldstone (Times, December 10) one of the women suffragists sued the London English Home Secretary, the governor of the prison, and the medical officer of the prison, for damages for assault in forcibly feeding her. No points of law were decided, or are likely to be decided, in connection with this case, for, according to the report, "the jury, after considering two minutes, returned a verdict for the defendants and judgment was entered accordingly."**

**Whether any civil action or other proceedings for assault and injuries suffered in prison can be brought as a matter of law, remains, therefore, a question still unsettled in England. There appears to be no precedent, says the Solicitor's Journal, for an action in respect of an alleged tort suffered by a prisoner during incarceration. The experiment was tried in New South Wales some years ago by a convict who lost his eye through the bursting of the gauge glass of a steam engine, but without success. This case is Gibson v. Young (1899) 21 N. S. W. R. 7. The convict was put to work in the gaol at a steam engine, and it was alleged that, through the negligence of the prison authorities, the gauge glass broke and injured the plaintiff, with the result that he lost the use of one eye. The point of law was raised in the form of a demurrer to the declaration under the Common Law Procedure Act, that no cause of action was disclosed, and the demurrer was upheld. The action was brought against a nominal defendant on behalf of the government (under the colonial procedure), and in England would have been by petition of right against the crown. The Supreme Court held unanimously that the action would not lie, the principal ground of decision being that it was against public policy that the executive should be liable to any such action. It was, however, also said that the action would equally have failed had it been brought directly against the prison authorities. In England an action ex delicto cannot be brought against the crown, even by petition of right, whereas in New South Wales, and many other parts of the over-sea dominions, such an action is allowed by statute. See the judgment of the Privy Council in Farnell v. Bowman, 12 A. C. 643. It follows that the reasons which militate against the right of a prisoner in New South Wales to sue for a tort committed by the prison authorities, apply a fortiori in England.**

## ERROR IS PRESUMED TO BE PREJUDICIAL UNLESS IT AFFIRMATIVELY APPEARS THAT IT IS NOT.

Kansas holds the record in espousing popular reforms, and as far as known, it is first, or at least, among the first, to mold the latest popular fad, to eliminate technicality from the law, into its new code of civil procedure. Here is the section:

Section 581. "The appellate court shall disregard all mere technical errors and irregularities which do not affirmatively appear to have prejudicially affected the substantial rights of the party complaining, where it appears upon the whole record that substantial justice has been done by the judgment or order of the trial court; and in any case pending before it the court shall render such final judgment as it deems that justice requires, or direct such judgment to be rendered by the court from which the appeal was taken, without regard to technical errors in the proceedings of the trial court."

There has been persistent condemnation in the recent past of delays in litigation, both civil and criminal, due to reversals of judgments and orders of trial courts, by the appellate tribunals. It is well known that the president of the United States has expressed himself as decidedly against this practice. On June 26th, 1905, in an address before the Yale Law School he said: "No judgment of a court below should be reversed, except for an error which the court after reading the entire evidence can affirmatively say would have led to a different result." Other noted men of national reputation have deplored and denounced the practice of reversing cases. When presidents, or other men of such celebrity emit an idea, whether well considered or only half baked, many people waive all reason and take this for gospel, and quite often state legislatures avail themselves of the opportunity to prove their party loyalty by legislating presidential hobbys into the state statute books. The one above quoted was so begotten.

That delays in litigation are expensive and annoying is freely conceded, but it is not true that the most vexatious delays result from reversals of cases. The delays which are the most annoying to lawyers, and the most expensive and damaging to litigants are, in a large measure, traceable to the congested state of court dockets. From a year and a half to two years often elapse between the time of the commencement of an action, and its final disposition in the trial court. This is a condition which prevails almost everywhere. It is bound to become more acute with the increase of new laws and penalties for their infraction. In some districts, comprising more than one county the law allots but a specified number of days to each county for the purpose of holding court therein, and the court can hardly ever dispose of pending business within the time allotted; consequently all unfinished business must be carried over to the succeeding term, and term after term, and year after year the work accumulates and the court gets farther behind. The corrosion of time acts on the causes of action, and wears out justice. In districts consisting of but one county, the business of the several terms of court therein often laps over, and the result is the same—the court is usually away behind. Those who have important matters pending naturally clamor to be heard, and the court is often over-worked and hurried, so that the judge cannot take the necessary time to properly consider the questions involved in the cases before him. He soon forms the habit of taking a judicial shot at a case and then passing it up to the supreme court. This tends to increase the number of appeals, and consequent delays in obtaining records from the stenographer, who, of course, cannot attend court and take testimony and at the same time make transcripts in cases which have been tried. Therefore, parties must wait until the stenographer gets ready. A tendency to appeal many cases from the district or trial courts

crowds the dockets of the supreme court, and so in most jurisdictions that court is from one to three years behind. It is not unusual that it takes from three to five years for an aggrieved party to obtain his rights in court, without encountering a single extraordinary dilatory move or technicality resulting in delay. After this long wait a case is finally heard before the supreme court, generally composed of seven justices. This court disposes of from seventy-five to one hundred cases each month. Ten days are usually consumed each month in the hearing of oral argument. This leaves about fifteen working days within which to read and consider from seventy-five to a hundred more or less lengthy and complicated records, or abstracts, twice that number of lawyers' briefs, and then write opinions in each case. It becomes necessary to divide the work, and each judge is obliged to hurry through ten or more cases, in about fifteen days. In those jurisdictions where there are quarterly or semi-annual sessions, the proportion remains about the same as above instanced, and so where there are more or a less number of judges. The lawyers in these cases who are not very much inferior in ability to the average supreme judge, spend from ten days to two weeks in the preparation of the brief and argument in any one case. But at the end of the month all the justices concur," and the inference is forced upon us that all the justices have really taken active part in all of the cases, which, as a matter of fact, had their decisions ground out as if by machinery. Then we say, our courts are weak. Ought it not to be clear to any one that under existing conditions the judges of the appellate courts cannot do very much with the cases before them, except to hurriedly glance at the citations and precedents, and as near as possible decide the cases according to what to them seems to be somewhere in line with such precedents? Is it a wonder that our modern decisions are almost devoid of originality, and that many unusual mistakes and consequent delays occur? These things, however, must not be laid at the door of the law. Neither are they due to technicalities in the law. Nor is it necessarily true that the judges are weak, inferior or wanting in knowledge or capacity. The trouble is that we have too many laws and not enough judges. We do not need more courts. Obviously, to increase their number would only tend to aggravate the matter. We want more judges in the trial and appellate courts.

An editorial in one of the leading law journals contains the following on this subject: "It is an oft repeated remark that the opinions of the judges of an earlier day show a deeper consideration and more careful work generally than those of recent years. The reason is plain enough. Our judges of today have, man for man, infinitely more work to do and a greater demand upon their time, and are victims of too much law made by legislatures and courts, while the old-time judges had a deeper knowledge of fundamentals. We are apt to think, with the progress of time, we are moving away from the principles which guided our fore-fathers in their judgments. We forget that Rome developed arts and sciences which modern effort has failed to equal, and that the philosophy of the law was never better known than in the days of Justinian, who saw the necessity of gathering the best principles into form from the masses of opinions of great legal lights, as clashing and conflicting as those which in modern times confuse and befog the minds of our judges, and thus constantly add to existing chaos. Codes have been introduced to escape from the perplexities which grew up with the common law procedure, but the codes in most states have proven a delusion and a snare, because of the manner of their interpretation, and the ineffectual efforts of legislatures to afford relief. The most important function of government is the securing of wise laws. It must then be apparent that the securing of men of high moral principles and conceptions, deeply learned in the fundamental principles of the law

(to preside over the courts), should be the chief endeavor of political policy. * * * These men should not be over-worked, but they should have ample time for the consideration of every case brought before them. * * * It is good economy to secure the best ability for the bench. A judge who has to learn fundamental principles after he has gone on the bench, clogs the progress of the courts' business, if he does conscientious work, and it is better to go slow and be sure than to rush through ill-considered opinions. A bull turned loose in a china shop could not begin to create the havoc that a judge may, who slashes around among the datum posts of the law which centuries of wise men have established. * * * The forming and writing of correct legal opinions requires the highest order of ability, and great pains and care in the efforts to keep up with the work. It is not surprising that many mistakes are made, and that in the attempt to discriminate between conflicting opinions the best course is frequently not adopted."

Revision of procedure acts, and legislative construction of laws as a general rule only add to troubles sought to be corrected. Broadsides like that in President Roosevelt's message to congress, December 4th, 1906, can serve only to set in motion radical agitation, resulting in the enactment of unheard-of statutes, often injuring most those whom it was thought it should specially benefit. President Roosevelt said: "I would like to call attention to the very unsatisfactory state of our criminal law, resulting in large part from the habit of setting aside the judgment of inferior courts on technicalities, absolutely unconnected with the merits of the case, and where there is no attempt to show that there has been any failure of substantial justice." Attorney General Bonaparte, November, 1908, in an address before the National Municipal League, dramatically demanded: "Why need there be a foretaste of eternity between arrest and indictment, another between indictment and trial, and yet another between trial and punishment?" His own answer is, "partly because the bench and the professional opinion among the bar tolerate all kinds of dilatory, frivolous and often ridiculous proceedings on the part of unscrupulous counsel intended to cheat justice of her plain due, and partly because our law-makers afford almost infinite facilities for review of judicial action to the criminal, although being very stingy in allowing them to the government."

The law is a system of rules, and these must necessarily be couched in technical terms, and in the very nature of things must be applied according to fixed rules. To say that appellate courts shall disregard all technical errors and irregularities which do not affirmatively appear to have prejudiced the rights of the complaining party, is to say that courts of review shall be abolished. Reviewing courts have no functions except to pass upon the decisions of inferior courts and to correct their errors. It is impossible in most instances for an appellant to show affirmatively that he has been prejudiced by an error of law, however gross, committed by the trial court at the trial, for this, in most cases, depends on the effects produced by the obnoxious matter upon the minds of the jurors or triers of the facts, which, of course, cannot be reliably shown. The law has properly limited inquiry here. It is equally difficult, if not impossible, for a reviewing court to determine, as a matter of law, that no prejudice has resulted from the commission of an error against the complaining party. The effect of such statutes against reversals and technical law would make out of appellate courts mere trial courts, instead of courts of review. And their trials, at that, would have to be conducted upon cold error-distorted records, coming up from the court below. It was tried in North Dakota to make the supreme court a tribunal for the trial de novo on appeal. It was found necessary, in connection with this novelty in procedure appellate, to let all evidence offered go in, although it consisted of Ayer's Almanac, or Webster's Unabridged, bodily. The trial judges, un-

der this law, became mere referees for the taking of testimony in such cases. With all this before them, the supreme judges found (and so expressed it) that they were not in as good a position to decide truly, upon the cold record, as the trial judge was, when he had the live case, with the witnesses themselves before him. It resulted in more and more delay, witness the numerous reversals and remandings under Section 5630 of the Revised Statutes, N. Dak. To make an appellate court something other than a court of review for the correction of errors, is foreign to the entire scheme and trend of the law.

Manifestly no invariable rule or standard can be adopted by a court, even as to when an error committed by an inferior tribunal shall be ground for a reversal of a judgment. Nor can there be a graduated scale by which to distinguish the so-called technical errors from the main body of error in law. They are all technical, or else quite unavailing for want of precision. Much less can it be properly adjudged, in advance, by a legislature that "error shall be disregarded." Such statutes should be disregarded, or, better, declared unconstitutional, as encroachments upon the province of the judiciary.

A case on reaching the appellate court is clothed with certain presumptions in favor of the rightfulness of whatever has been done in the lower court, and as a part of this presumption there is at the outset of the examination of every case in an appellate court a presumption that the verdict was right. But when it is made to appear to that court that the jury were misdirected on a matter of law, or if some other error which may have improperly influenced them in arriving at a conclusion in the case against the complaining party, is pointed out to that court, this general presumption (that the verdict and all the trial proceedings were right and proper) gives way, and a contrary presumption obtains—that a conclusion based upon an erroneous conception as to the law is itself erroneous. Unless, then, there is that in the record which clearly rebuts this presumption, the judgment must be reversed, because of such mistake, and some courts even refuse to look into the evidence for the purpose of determining whether it sustains such finding.[1]

The whole effort of the courts of error is to see that the intermediate steps by which the verdict or decision was reached were free from legal error. They do not inquire whether the jury were actually misled by the errors committed, but the investigation is limited to whether the error was calculated to mislead them.[2]

The sound view is that where the record on appeal shows errors committed by the trial court against the right of the complaining party, and where such error has been saved by proper exception, and where the complaining party has done nothing to estop him from alleging the error as ground for appeal, or where such errors have not otherwise been cured, and there is not that in the record which shows to a reasonable or moral certainty that the decision was right, or that a new trial, if properly conducted, must lead to the same result, a new trial must be granted.[3] Or if the record does not show what effect an error upon a material point in the case may have had upon the decision, and in the nature of things it cannot show this, a new trial must be granted.[4] The mere fact that the court, if sitting as the trier of fact, would reach the same conclusion from the evidence disclosed by the record, is not sufficient to warrant the ignoring of a vital error in the introduction of proof or in the instructions in jury cases. In short, the majority of the courts presume prejudice from error, once it is shown to exist, and require the party defending against error to show that no

(1) Young v. Pacific Mail S. S. Co., 1 Cal. 353; Chandler v. Fulton, 10 Tex. 2; Boyden v. Moore, 5 Mass. 365; Dudley v. Sumner, 5 Mass. 438; Lane v. Cromble, 12 Pick. 177; James v. Langdon, 7 B. Mon. 193; Field v. Deatley, 10 B. Mon. 4.

(2) Benham v. Cary, 11 Wend. 83; Hastings v. Bangor House, Proprietors, 18 Me. 436; Potts v. House, 6 Ga. 325.

(3) Thacher v. Jones, 31 Me. 528; Noyes v. Sheppard, 30 Me. 17.

(4) Gaines v. Buford, 1 Dana, (Ky.), 481; Beaver v. Taylor, 1 Wall. (U. S.), 637.

harm resulted. This is quite the reverse of what is directed in the statute and theories under consideration.[5] Where ruling indicates radically wrong theory of case prejudice will be presumed.[6]

Where evidence is improperly admitted the prima facie presumption is that it was considered by the jury in reaching a verdict.[7] Prejudice is presumed from exclusion of evidence as to damages in actions sounding in tort, and the court cannot look into the evidence to determine whether there has been prejudice.[8] Prejudice is presumed from striking out a defense where it does not appear from the record that the judgment would have been the same had the defense been considered.[9] Erroneous instructions are presumed prejudicial.[10] It is only when it is clear that no prejudice resulted or could have resulted that the judgment may be affirmed.[11] Exclusion of material evidence is reversible error, unless it appears beyond reasonable doubt that such exclusion was harmless.[12] Where it is impossible to ascertain whether the jury were influenced by the incompetent evidence, its admission calls for reversal.[13]

(5) In re Deans' Estate (Cal.), 87 Pac. 13; Lake Erie & W. R. Co. v. McFall, 165 Ind. 574; Englander v. Fleck, 101 N. Y. Supp. 125; Dunn v. Currie (N. Car.), 53 S. E. 533; Mo., etc., R. R. Co. v. Williams, 16 Tex. Ct. Rep. 847; Grote v. Molton (Vt.), 64 Atl. 453.

(6) Booneville National Bank v. Blakey (Ind.), 76 N. E. 529. Admission of incompetent evidence presumed prejudicial. Fountain v. Wabash R. Co. (Mo.), 90 S. W. 395; St. Louis, etc., R. Co. v. Courtney (Ark.), 92 S. W. 251; Lane Bros. & Co. v. Bott (Va.), 52 S. E. 258.

(7) Johnson v. Atlantic Coast Line R. Co. (N. Car.), 53 S. E. 362. Improper exclusion of evidence presumed prejudicial. Inman Bros. v. Dudley and D. Lumber Co. (C. C. A.), 146 Fed. 449.

(8) City of Valparaiso v. Spaeth (Ind.), 76 N. E. 514.

(9) Houston & T. C. R. Co. v. Thompson, 16 Tex. Ct. Rep. 888, 97 S. W. 106.

(10) Galveston, etc., R. Co. v. Parish (Tex.), 93 S. W. 682; Southern R. Co. v. Forgey (Va.), 54 S. E. 477; Smith v. Perham (Mont.), 83 Pac. 492; Ferrell v. Ellis, 129 Iowa, 614; American Tobacco Co. v. Polisco (Va.), 52 S. E. 563; Fothergill v. Fothergill, 129 Iowa, 93.

(11) Bank of Havilock v. Western Union Tel. Co., 141 Fed. 522 (C. C. A.)

(12) Central Trust Co. v. Culver (Colo.), 83 Pac. 1064.

(13) St. Louis, etc., R. Co. v. Courtney (Ark.), 92 S.W. 251.

The statutes everywhere prescribe the metnod of obtaining a new trial, and specify the grounds therefor, and also provide what steps must be taken in order to perfect an appeal. Many cases go off on technical ground, in the appellate courts, because such statutory requirements have been ignored by counsel in the case, although there may be a crying demand for the consideration of the case on the merits, and then uninformed and unthinking persons set up a howl against the "technicalities of the law." The whole procedure is, of course, of a technical nature, and unless its own prescribed rules were abided by, where would it all lead to? The court has simply no right or jurisdiction to consider a case which does not come before it by virtue of the statute, and in pursuance of the taking of the statutory steps. And it is much the same with the trial of cases in the first place. A trial in which the rules of law (itself but a rule) have not been followed is a mistrial—is no trial at all. A judgment should be, and is the highest evidence of what is the truth concerning the matter in issue. Can it properly be based and rendered upon the antithesis of truth —error.

There is too much delay in the administration of law. It is not implied that a great deal of this is not due to an undue toleration of dilatory tactics. If courts were not so far behind, such moves, like the weird Sisters in Macbeth, would soon vanish into thin air. There is seldom any merit in these tactics. Courts favor certain lawyers with a speedy disposition of their business, and then, again, with delays, according to the exigencies of their business. Clearly, such troubles cannot be reached by remedial legislation. What we need is more judges, and those honest. Sometimes district judges have failed or refused to dispose of pressing court business because it was claimed to be a season in which jurors could not, without inconvenience, remain in attendance upon the court—having pressing work or business matters at home. To adjust the public necessities of the court

business to the convenience of jurors in this way does not even lie within the proper discretion of the judge, but relief against such a course can only be had by mandamus attended with great difficulty—and in the end, as great delay to litigants.

The above statute, in its sphere virtually repudiates the wisdom, experience and settled course of a thousand years. It is an attempt to remedy wrongs, by curtailing and taking away rights. The trouble is due, in part, to the fact that the court machinery is over-worked, and in part to the malfeasance of those charged with the administration of law—to the abuse of discretion for the benefit of favorites. To attempt to mend this by taking away well-established and vital portions of the law is like burning the ship to get rid of the cockroaches.

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## INSURANCE—NOTICE OF CANCELLATION.

### TAYLOR v. INSURANCE CO. OF NORTH AMERICA.

Supreme Court of Oklahoma.

The return of the unearned premium is essential to a cancellation by the company, where the policy, among other things, provides, "when this policy is canceled by this company by giving notice, it shall retain only the pro rata premium."

WILLIAMS, J.: The agent of the company, in whose possession the insured left the policy upon which this action was based, was named Comer. On September 26, 1904, Comer met Taylor on the streets of Claremore and said to him: "The insurance company has canceled your policy on your hay." Taylor asked him on what ground, and the agent said: "They did not state." Taylor then said: "Where is my money?" or "How about my money I have paid them, if they have canceled it? How about my money?" And the agent said: "They did not say anything about it." Taylor rejoined: "I guess I can get my money then, if they have canceled it." The agent, Comer, testified that he canceled the policy on September 26, 1904, and on that day returned the same to the company.

It is the contention of counsel for plaintiff in error that the company, under the terms of this policy, could not cancel it except that it at some time tendered or returned to him the unearned premium in accordance with what he argues are its terms, and on account of the fact that this unearned premium was neither returned nor tendered prior to October 9, 1904, that this had the effect of keeping alive the policy and rendering the company liable for the loss. The paragraph of the policy relating to cancellation is what is commonly known as the "New York standard form," and reads as follows: "This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company by giving notice, it shall retain only the pro rata premium." The construction of this contract is necessary in order to determine whether or not the policy is canceled. If the construction contended for by the defendant in error is correct, the clause was intended to read as follows: "If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the earned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company by giving notice (on surrender of this policy), it shall retain only the pro rata premium." Without the interpolation of the words "on surrender of this policy" in the last clause, there is an ambiguity, and there is equal reason for the following interpretation: "If this policy shall be canceled (at any time at the request of the insured), or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of the policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company by giving notice, it shall retain only the pro rata premium."

When the policy is canceled by giving "five days' notice of such cancellation," the company retaining "only the pro rata premium," this cannot be accomplished without a tender, unless the words "on surrender of the policy" are read into said clause; and if that was the intention, why repeat the words "by giving notice?" If that contention is correct, it should

should have been stated as follows: "This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company, * * * it shall retain only the pro rata premium." To say the least, the cancellation clause is ambiguous, and when we consider that the insurer was skilled, not only in the framing, but also the interpretation, of such contracts, and that the insured had no part in the framing thereof, as well as being unskilled in such interpretation, such construction should be adopted as is more favorable to the insured; and especially is this true when the construction contended for by the insurer is not only inequitable, but also unjust.

The contract of insurance here involved, known as the "New York standard policy" was framed by virtue of chapter 488, p. 720, of the laws of New York of 1886, providing for a uniform contract of fire insurance to be used by fire underwriters within said state. The clause here under consideration was first before the Supreme Court of the State of New York in the case of Nitsch v. American Central Insurance Company, 83 Hun, 614, 31 N. Y. Supp. 1131, wherein a tender was construed to be necessary to the cancellation of the policy. The judgment of the Supreme Court was affirmed by the New York Court of Appeals on March 16, 1897 (152 N. Y. 635, 46 N. E. 1149). Afterwards, on March 1, 1898, in the case of Tisdell v. New Hampshire Fire Insurance Company, 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765 (see, also, Id. 11 Misc. Rep. 20, 32 N. Y. Supp. 166), it was again held that a tender was a condition precedent to the cancellation of such a policy—the opinion being delivered by Mr. Justice Bartlett, concurred in by Justices Haight, Martin and Vann, and Chief Justice Parker and Mr. Justice O'Brien dissenting, and Mr. Justice Gay being absent. Again, in the case of Buckley v. Insurance Co., 188 N. Y. 399, 81 N. E. 165, 13 L. R. A. (N. S.) 889 (see, also Id., 112 App. Div. 451, 98 N. Y. Supp. 622), the Court of Appeals, following the Nitsch and Tisdell cases, said: "It is a question of vital importance to the insurer and the insured as to the precise meaning of the cancellation clause in the standard policy. The situation is not a complicated one, and the court desires to so construe the clause that its meaning may be made clear. If the insurance company desires to cancel, it must, as we have held in the cases cited, not only give the notice required, but accompany it by the payment or tender of the pro rata amount of the unearned premium. It cannot legally demand of the insured the surrender of the policy and its cancellation until this is done." The court was unanimous as to the foregoing conclusion. At that time Chief Justice Cullen, and Justices O'Brien, Haight, Hiscock, Bartlett, Chase and Vann comprised the court.

In the case of Philadelphia Linen Co. v. Manhattan Fire Insur. Co., 8 Pa. Dist. R. 261, that court, after referring to the Tisdell case, said: "The question which is now before us was then passed upon by the Supreme Court of New York upon a policy where the language was identically the same as that which has been quoted from the defendant's policy. The majority of the court in that case decided that, upon cancellation of the policy by the company, it must return or tender the unearned premium in order to effect a cancellation. The same conclusion seems to have been arrived at by the same court in an earlier case, Nitsch v. American Cent. Ins. Co., reported in 152 N. Y. 635, 46 N. E. 1149. While these decisions are not binding upon the courts of Pennsylvania, they are, of course, entitled to great respect. It is, no doubt, eminently proper to hold companies and corporations, such as insurance companies, to a strict construction of their rights as defined in formal contracts, which are prepared in their own interest and the terms of which the insured, as a rule, has little or no part in determining. This has been the policy of the courts, and has been found by experience to be necessary in order to guard the interests of those who are in many cases ignorant, and in all cases more or less at the mercy of such corporations. The courts of this state have been moved by the same policy, and it may be, and we are inclined to think, that the attitude which has been taken by our own Supreme Court with reference to provisions not identical with, but similar to, those in question, requires us to follow the ruling which has been made in the state of New York."

In the case of Gosch v. Firemen's Insurance Co., 33 Pa. Super. Ct. 496, the court said: "The plaintiff, then, having paid the premium for the entire term, could the defendant, at its own pleasure, effect a complete extinguishment of the insurance contract, merely by giving notice of its determination to cancel, without at the same time returning or tendering the unearned portion of that premium? Where a contract with mutual undertaking has been entered into by two parties and fully performed by one of them, we may certainly say, speaking generally, that the other party could not

successfully invoke the aid of any court in an effort to rescind until he had returned or tendered the return of any valuable thing he had received to retain the benefits and at the same time repudiate the burdens of his own agreement would be highly unconscionable and shocking to our sense of natural justice. It would be out of harmony with some of the fundamental principles on which our entire system of jurisprudence is built. Of course, where the right to cancel has been expressly reserved, in the contract itself, then the extent of the right and the conditions upon which it may be exercised must be determined by a reference to the contract, rather than to principles of general law. Turning, then, to the language of the agreement, in which the parties have undertaken to state their respective rights and duties, if we find it susceptible of two constructions, one in harmony with, the other in opposition to those general principles already referred to, a sound discretion would seem to invite us to accept the former and reject the latter, just as, in ascertaining the true meaning of a doubtful clause in a will, the courts incline to that construction which would vest the estate, rather than leave it contingent, which would give the inheritance to the heir rather than to a stranger. Taking up, then, the provision of the policy on this subject, and looking at it as a whole, we may confidently say that it contemplates a complete and effective destruction of the contractual relation at the instance of either party, and that to accomplish his end the party moving must do two distinct and separate things; the object in view undeniably being that, when the cancellation shall have been completed, both parties will have been restored, as far as possible, to the conditions existing before the contractual relation began. If the destruction of this relation be begun by the assured, he must give notice to the other party and surrender his policy, which proclaims the existence of the relation he would now destroy. If begun by the company, it must also give notice and repay or tender payment of the unearned premium in its hands. The right reserved to each party is but a single one, viz., the right to cancel; and the cancellation contemplated is not a partial, but a complete one. The obligation imposed on the party moving to cancel is, looking broadly at the entire contract provision, also single, viz., the restoration of the other party, as far as may be, to the situation occupied before the contractual relation began. True, this involves the performance or tender of performance of another act besides the giving of notice; but it does not necessarily follow that such performance or tender may be totally dissevered in time from, and thus rendered wholly independent of, the giving of the notice. Such a construction of the policy provision, although strongly urged on us by the learned counsel for appellant, is, at best, a doubtful one. More than this he can hardly claim for it, in the light of the fact that it has been deliberately rejected by the courts of last resort of most of our sister states. The argument supporting it, as he agrees, has been stated, as forcibly as it can be, in the dissenting opinion of Chief Justice Parker in Tisdell v. New Hampshire Fire Ins. Co., 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765. An examination of this opinion seems to show that its conclusions are reached rather from a critical analysis of some of the language of the policy provision and the order in which its sentences are collated than from a broad view of the entire provision and a consideration of the nature of the object to be accomplished thereby. The following language from the majority opinion clearly indicates that the question must now be considered as settled in that jurisdiction: 'The question presented on this appeal is no longer an open one in this court. It was decided in Nitsch v. American Central Ins. Co., 162 N. Y. 635, 46 N. E. 1149, affirmed in this court without an opinion. In that case, as in this one, the question presented was whether the provision of the New York standard policy of fire insurance relating to the cancellation of a policy at the instance of the company requires that, in addition to giving the five days' notice, the company must return or tender the unearned premium in order to effect a cancellation? The answer was in the affirmative. In an elaborate discussion of the whole subject, to be found in Cooley's Brief's of Insurance, wherein all of the cases from the various jurisdictions are cited and considered, the general rule to be drawn from them is thus stated on page 2801: The general rule is that under such a provision, unless waived, the repayment of such proportion of the premium is essential to a valid cancellation, and notice without such repayment or a tender of the amount is ineffectual. * * * There must be an actual repayment or tender; a mere promise to pay, a request to call for the amount due, or notice that the money is subject to insured's order, being insufficient.' "

In 33 Pa. Super. Ct. 505, the court further said: "But we cannot regard the question as an open one, because we believe it to have been ruled in the case of Baldwin v. Penna. Fire Ins. Co., 206 Pa. 248, 55 Atl. 970. In that case, the suit being on a policy similar to the one now under consideration, the company in its affidavit of defense set up 'that the policy in suit had been surrendered and returned for cancellation, and actually

had been canceled on December 8, 1897.' We have not the record actually before us, but take this statement from the paper book of the appellant, which we have carefully examined. The trial court held that the contract of insurance had never been completed, and the policy had never gone into force, and on this ground non-suited the plaintiff. This court affirmed the judgment for the same reason. But the Supreme Court held that the contract had been fully completed, and therefore the policy was in force at the time of the fire, unless it had been canceled meantime, as the company had alleged. As the case was sent back to be retried, the court could not well avoid disposing of this important defense, set up by the averment of the affidavit quoted, and we think they did it in no uncertain manner. Speaking for the court, Mr. Justice Dean, after pointing out the character of evidence necessary to show a cancellation at the instance of the insured, turns to the question now before us and says: 'The company gave no notice of its intention to cancel as required by the contract, nor did it return nor offer to return five-sixths of the premium, a preliminary to cancellation as the contract required. We can take no other view of the evidence than that the contract of indemnity was complete when Hatfield and the agent both agreed to it, and the agent, by consent of Hatfield, retained for the company the unearned premium. Was the contract afterwards rescinded or cancelled by the company, or by consent of Foster, the attorney (for the insured)? The company could cancel it just one way at any time. That was by five days' notice to the representative of the estate of its intention to do so and return five-sixths of the premium. It gave no notice and offered to return no premium.' We are earnestly urged by the learned counsel for the appellant to regard this clear and emphatic statement of the law, upon the very point now under consideration, as merely dictum; but we are wholly unable to do so, in the light of the fact that the cancellation of the policy was a defense distinctly raised by the pleadings, and the further fact that in the judgment entered, in which the entire court concurred, we find the following: 'On a retrial it is directed that the law be announced as we have indicated.' etc."

In the case of Continental Ins. Co. v. Daniel, 78 S. W. 866, 25 Ky. Law Rep. 1501, the court said: "The difference between the contentions of appellant and appellee is this: The appellant contends that the notice and tender must be given and made five days preceding the cancellation, which takes effect immediately. The appellee contends that the act of cancellation should take place, and notice and tender be given and made, and five days after this the cancellation takes effect, and the policy is then no longer in force. The lower court took appellee's view of the matter, and we are not prepared to say that the court erred. This provision of the policy is somewhat ambiguous. This court has repeatedly decided in such cases that the policy should be construed most strongly against the company, as it prepared it. This language of the policy seems to support the construction contended for by appellee, to-wit: 'This policy shall be canceled at any time * * * by the company by giving five days' notice of such cancellation. * * *' This seems to imply that the act of cancellation preceeds the notice; but the cancellation is not to take effect until five days after the giving of the notice of the cancellation and the tender of the premium."

In the case of Chrisman & Sawyer Banking Co. v. Hartford Fire Insurance Co., 75 Mo. App. 310, that court said:

"In the rescission of a contract by one party, it is a necessary condition precedent to such rescission to place the other party in statu quo—to restore to him whatever may belong to him by reason of bringing the contract to an end. This is the general rule, as applied to all cases of contract. And within this rule it has been repeatedly held that before an insurance company can make an effective cancellation it must return or tender the unearned premium. * * * In this case no attempt was made to do so. No effort was made to ascertain what the unearned premium was, and certainly it will not be pretended that the president of the woolen mill released his claim for that. But it is said that this particular policy provided that the unearned premium was to be returned 'on the surrender of the policy.' And, as the policy was not surrendered, it was not necessary to return the premium. We think the return of the premium and the surrender of the policy, under the terms of the contract, were concurrent acts; that neither could be demanded without the other. But, as defendant was the party seeking cancellation, it was its duty first to have tendered the unearned premium on a surrender of the policy. It then would have done all that the contract required it to do in order to place the assured in statu quo."

In the case of Hartford Fire Insurance Co. v. Cameron, 18 Tex. Civ. App. 237, 45 S. W. 158, the court said: "We think that the cancellation clause, taken as a whole, means that, when the company elects to cancel the policy, it must, upon giving notice of such intention, at the same time return or tender to the insured or his agent the unearned portion of the

premium. The latter part of the clause, by providing that the company, in such cases, 'shall retain only the pro rata premium,' clearly implies that the other portion shall be returned; and, while it does not in turn declare when the return shall be made, it would be unreasonable and unjust to allow it to cancel its obligation and retain the consideration upon which it was based. It would be equally as unjust and inequitable to require the insured 'to dance attendance at the place of business of an insurance company, and await their pleasure,' and probably be put to his action to recover the little sum due him, the cost of which might be greater than the sum due."

In the case of Hartford Fire Ins. Co. v. McKenzie, 70 Ill. App. 615, the court for the Second district, in construing an identical contract, said: "Where the company seeks to cancel the contract under such stipulation as is above set out, the insured does not have to tender his policy, in order to entitle him to receive back the unearned premium; but it is for the company desiring cancellation to seek the assured and tender the money to him, and till it does so the cancellation has not been effected." See, also, Peterson v. Hartford Fire Ins. Co., 87 Ill. App. 567; Hartford Fire Ins. Co. v. Tewes, 132 Ill. App. 321; Williamson v. Warfield-Pratt-Howell Co., 136 Ill. App. 168; Mississippi Valley Ins. Co. v. Bermond, 45 Ill. App. 22; Hamburg-Bremen Fire Ins. Co. v. Browning, 102 Va. 890, 48 S. E. 2; 2 Clement on Insurance, p. 405.

In the case of Mississippi Fire Ass'n v. Dobbins, 81 Miss. 630, 33 South. 506, the same character of contract is construed, and the court, going further, hold that, even in case the contract becomes void, before the company can defend, it must tender and pay over to the insured the unearned portion of the premium.

The authorities holding to the contrary are as follows: Schwartzchild & Sulzberger Company v. Phoenix Insurance Company of Hartford, 124 Fed. 52, 59 C. C. A. 572; Id. (C. C.) 115 Fed. 653; El Paso Reduction Company v. Hartford Insurance Company (C. C.), 121 Fed. 937; Davidson v. German Insurance Company, 74 N. J. Law, 487, 65 Atl. 996, 13 L. R. A. (N. S.) 884; Insurance Company v. Brecheisen, 50 Ohio St. 542, 35 N. E. 53; Newark Fire Insurance Company v. Sammons et al., 11 Ill. App. 230.

Such policy being framed by virtue of the laws of New York, and the highest court of that state having interpreted same, such construction should be of most persuasive influence, if not binding with us, especially when supported by the weight of authority. Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. Ed. 682. Hence we hold that the policy was not canceled; no tender having been timely made.

2. It is further insisted that the assured consented as a matter of law that the contract of insurance should be canceled. We do not so conclude from the evidence. Hartford Fire Ins. Co. v. Tewes, 132 Ill. App. 321.

3. As to the question of forfeiture on account of the alleged incumbrance, that was a question for the jury; there being a conflict in the evidence thereon. The fact that a mortgage may have been made thereon and filed of record, and not canceled of record, was not conclusive. It was competent to show the mortgage security had been changed or substituted, or that the debt had been extinguished by renewal and taking other security or payment. All these questions were for the determination of the jury.

The case is reversed and remanded, with instructions to grant a new trial.

Kane, C. J., and Turner, J., concur. Dunn and Hayes, JJ., dissent.

NOTE.—*Necessity of Tender of Unearned Premium in Cancellation of Standard Policies.*—We noticed some cases in 69 Cent. L. J. 450, in annotation under the title "Liberality of Construction of Insurance Policy in the Saving of Insurance." The principal case there seemed to us, while conceding such a rule, to have refused, erroneously, to bring the clause there considered within its reach. In the principal case here the error appears to be in tipping the beam to the other side. Judge Hayes, with whom concurred Judge Dunn, wrote a very elaborate dissent, and he thus speaks of the authorities the prevailing opinion cites in its support: "They may be logically divided into three parts: First, those in which the holding is dictum; second, those in which the discussion is illogical; and, third, where there is no discussion whatever. The holding in the majority of cases is unalloyed dictum." Discursiveness, so much encouraged by the stenographic pencil, seems to be acquiring such a burden and infusion of driftwood and muddying soil, that clear currents of law and precedent are beginning to be despaired of. Therefore, the old maxim—*melius est petere fontes quam sectari rivulos*—it is better to seek the springs than whip the brooks—needs to be impressed upon our understandings.

*Analysis of Terms of the Contract.*—But before we proceed, let us see how Judge Hayes states the part of the policy considered by the court and then invite our readers to look at the prevailing opinion and notice the lack of analysis of its terms. Judge Hayes said: "Now let us look at the terms contained in this contract and see if there exists even a remote ambiguity. It naturally divides itself into three parts, which make three separate and distinct provisions for three separate and distinct contingencies. They are as follows: First, 'This policy shall be cancelled at any time at the request of the insured, or by the company, by giving five days' notice of such cancellation.' Second: 'If this policy shall be cancelled as here-

inbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate.' Third: 'Except that, when this policy is cancelled by this company by giving notice, it shall retain only the pro rata premium.' These three sections, read separately or together, carry their own interpretation with them. * * * There is no room, in my mind, for any alleged ambiguity about the paragraph, and it is a strained and unnatural construction, and that only, which can render such simple language, conveying ideas so naturally related and in such normal sequence, indefinite and uncertain."

In addition to what Judge Hayes says, we wish to say a little more specifically, that there is not only such natural interrelation and normal sequence in ideas, but there is a plain exclusiveness in these terms which forbids, absolutely, any necessity of tender accompanying notice of cancellation to make the latter effective. The unearned premium is to be "returned *on surrender* of this policy." Therefore it is not to be returned or offered on the giving of the notice. Obviously there is nothing to be returned, if the premium has not "been actually paid;" but only one way is provided for cancellation, and the principal opinion says there are two ways—one for policies, where the premium has "been actually paid," and another for policies where it has not "been actually paid." We are making liberal draft on the dissenting opinion and will pursue this course by examining the opinions in the cases relied on by the prevailing opinion in the principal case.

*Dictum Cases.*—The following cases show the driftwood and soil of *dictum* relied on by the majority: In the 70 Ill. App. case it was said in the opinion: "At the time of the fire, no notice had been served upon McKenzie that the Hanover Company had elected to cancel its policy and the unearned premium had not been paid or tendered to him," and: "Nothing had been done by the Hanover Company at the time of the fire toward cancellation, their letter to their own agent telling him they desired to cancel was not a compliance with any part of the stipulations relating to cancellation."

In the 136 Ill. App. case it was said: "The question is academic in this case." The 87 Ill. App. case was like that in 70 id. In 132 id. there was no notice given. In 45 id. the company's notice without return of premium was held effective, because no premium had been paid at all. This justifies our comment of there being two forms of cancellation under these rulings, when the clause on its face provides only for one.

In the 206 Pa. case it appears that the agent, insisting the policy was properly made out, and the attorney for insured that it was not, the agent asked him if he wanted it cancelled. He said no. The court said: "The company gave no notice of its intention to cancel the policy as required by the contract," and then seemingly as an afterthought it was said: "Nor did it return or offer to return five-sixths of the premium, a preliminary to cancellation as the contract required."

In the 102 Va. case the cancellation notice told insured he could obtain the unearned premium by surrender of the policy. "This he never did, and for six months before the fire, in absolute silence, acquiesced in the terms of cancellation." There the court said: "If this technical position could prevail," the policy was found to have lapsed for other reasons. That case, instead of supporting by *dictum* the majority opinion, seems the other way.

The 81 Miss. case shows that not even was there any notice given, but it was claimed the premium was accepted after the fire and no objection was made even on that account, but because there was other insurance. Everything said about cancellation and return of premium was beside the question. The opinion is very brief and seems a model in its allusion to nothing really involved in the case.

The 75 Mo. App. case shows the company wrote to the agent to cancel the policy and agent wrote asking it to continue the policy, and it wrote back to him refusing to do so. Agent told insured, and insured asked that the agent make further efforts. He replied it was useless and he would have to cancel the policy. The court said: "The assured must be informed, not that the policy *will* be cancelled, but that it *is* cancelled." Then it is recited the fire occurred the next day, and five days' notice was neecssary. Further on the court expressed the view that: "Return of the premium and the surrender of the policy were concurrent acts." This case seems to us, if *dictum* is to be considered, as against the majority view.

Thus we see that the Oklahoma Supreme Court gives additional illustration and example of a fault, which in decision writing has become painfully common. It puts its *imprimatur* on *dictum* as authority, when proper treatment of the first offender in that particular would be mild "in passing the imperfection by." These *dicta* have large currency given to them by court reporters. These gentlemen are selected to the places they hold upon the supposition that they are not merely members of the bar, but that they are lawyers in the stricter sense of that term. They are supposed to state in the headnotes they prepare the points decided, as involved in the cases they report, but we are of the impression that they put *dicta* in headnotes with undiscriminating liberality and to utter confusion. Any journeyman printer can do this much. But, if a court reporter cannot discern *dicta* from decision, he is something like a square peg in a round hole.

*Cases in Point.*—But let us look at some of the cases relied on, which did involve the question in the principal case. In the Cameron case, in 18 Tex. Civ. App. 237, there is no analyzing of the terms of the contract—or scarcely any. It says: "While it does not declare when the return shall be made, it would be unreasonable and unjust to allow it to cancel its obligation and retain the consideration upon which it was based." We think it does declare that it is to be returned upon surrender of the policy. The entire discussion in this case covers about fifteen lines and is based or purports to be based, on very few cases.

The Grosch case in 33 Pa. Super. Court, 496, is a fairly good discussion, except that it in part is a *petitio principii*, or begging of the question, in saying that the provision of the policy, looking at it as a whole, contemplates "a complete and effective destruction of the contractual relation at the instance of either party; and that to ac-

complish that end, the party moving must do two distinct and separate things." We think that statement is misleading in that it appears to say these distinct and separate things must, without the intervention of any act by the other party, be concurrent. We think the contract provides where the company acts that it shall give notice, and then the other party shall act and then, in its turn the first party. Otherwise there is to be surrender of the policy only when the insured moves. But, if such surrender is important in one case, why not the other? The opinion then asserts that the opposing contention has been "rejected by most of the courts of our sister states." It cites New York cases, 75 Mo. App. and 206 Pa. supra, the last two shown by us to be *dictum* cases.

The Tisdell case was, as shown in the majority opinion, and there was a dissent as stated, and this concurred in by O'Brien, J. and, one judge being absent, there was four for affirmance, these four claiming that the Nitsch case left the question no longer open in that court. Parker, C. J., said of the Nitsch case, in this dissent, that: "There was another ground upon which the affirmance of the judgment was required at the general term and in this court, namely, that after the insured had received the five days' notice of cancellation, he addressed to the corporation a letter of inquiry about it and received such a reply as constituted waiver of the notice which had just been sent out by the general agent, and thus it happened that the judgment of the circuit court rested upon a sure foundation and required affirmance." So even in New York it looks somewhat like the doctrine there started out with its basis on a *dictum*, and this is carried down to the Buckley case in 188 N. Y. 390, which also fails to discuss the question.

*Opposing Cases.*—19 Cyc. 644 says: "It is held by better authority that after the expiration of the five day notice required in case the cancellation is by the company, the insurance is deemed to be terminated and inoperative," and there is cited for this Vance on Insurance, § 183; Richards on Insurance (3d Ed.), § 288, and a number of cases.

In Parsons & Albaugh v. Ins. Co., 133 Iowa 532, where insured requested cancellation, surrendering at the same time his policy, it was said: "The request is all that is essential to a cancellation, but the policy must be surrendered to secure the return of the unearned premium. The design of the paragraph was to enable one party to the contract to cancel it without the consent of the other, and, to this end, precisely what was necessary to accomplish this result was prescribed." This observation may be classed as obiter also in a case where the company is cancelling, but it plainly shows the court's mind. All that is said about the company not having the right to "hamper" insured in cancellation is appropriate when turned around when the company is trying to cancel.

In Davidson v. Ins. Co., 74 N. J. L. 487, 13 L. R. A. (N. S.) 884, the dissenting opinion of Ch. J. Parker is quoted at length and approved. The note to this case in 13 L. R. A. (N. S.), supra, gives the cases pro and con and among them we notice what we have called the *dictum* cases. If those are omitted it is difficult to say on which side the preponderance in number of cases lies. It is quite evident, however, that dicta have played a part in this matter they should not have been allowed to play, and with all the reforms that have been discussed, one that should be eliminated is that.

The ever surging flood of legal literature would be profitably abated, if judges would avoid these things as far as possible in their opinions, and reporters and digest makers would cease stationing these wills-o'-the wisp in our marshy wilderness of precedent. We can scarcely conceive how any one would ever contend for such a meaning in any other than an insurance contract. And to say it is correct as to that approaches very nearly to saying, that an insurance company cannot formulate any sure provision for forfeiture upon notice. C.

## ENGLISH AND CANADIAN DIGEST.

### REPORT OF RECENT IMPORTANT ENGLISH AND CANADIAN CASES FOR THE WEEK.

**Criminal Law—Habitual Criminal—Trial of.**—Where a person who is charged under section 10 of the Prevention of Crime Act, 1908, pleads guilty of the "crime," but not guilty to being a habitual criminal, the jury may be sworn as if to try a misdemeanor whether the original crime be a felony or a misdemeanor. But if the crime to which he has pleaded guilty be a felony there is no objection to the jury being sworn as if to try a felony.—Rex v. Turner, Court Cr. App., 54 Sol. Journal, 164.

**Criminal Law—Indemnification of Bail—Conspiracy—Misdemeanor.**—An agreement between A., an accused person, and B., that if B. will go bail for A. he shall be indemnified against loss if the bail is forfeited, is not only an illegal contract in the sense that it cannot be enforced in a civil court, but it is also a conspiracy and an indictable misdemeanor as tending to produce public mischief.

If these facts are found the offense is complete, and the court need not put a further question to the jury as to whether these facts tended to produce public mischief.—R. v. Brailsford (1905), 69 J. P. 370 (1905) 2. K. B. 730, followed. Court of Criminal Appeal, 74 id. 41.

**Ecclesiastical Law—Repulsion from Holy Communion—Lawful Cause—Open and Notorious Evil Liver—Marriage with Deceased Wife's Sister.**—A. N. Banister was a baptized and confirmed lay member of the Church of England and a parishioner of the parish of Eaton in the diocese of Norwich. On the 12th of August, 1907, Mr. Banister, being then a widower, went through the form of marriage in Canada with his deceased wife's sister, also a baptized and confirmed member of the Church of England. This marriage was valid by the law of Canada, but invalid by the law of England until the 28th of August, 1907, the date of the passing of the Deceased Wife's Sister Marriage Act, 1907, when it became valid as a civil contract. By section 1 of that Act, "No marriage heretofore or hereafter contracted between a man and his deceased wife's sister, within the realm or without, shall be deemed to have been or shall be void or voidable, as a civil contract, by reason

only of such affinity: Provided always that no clergyman in holy orders of the Church of England shall be liable to any suit, penalty, or censure, whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office to which suit, penalty, or censure he would not have been liable if this act had not passed.'

In October, 1907, the vicar of the parish church of Eton refused to admit Mr. and Mrs. Banister to Holy Communion, whereupon they promoted a criminal suit against him.

By 1 Edw. 6, c. 1, s. 8, it was provided that the minister should not without lawful cause deny the sacrament to any person who should devoutly and humbly desire it, and by the notice prefixed to the Order of the Holy Communion in the Prayer Book, a minister was permitted to repel from the Lord's Table "an open and notorious evil liver so that the congregation be thereby offended."

The criminal suit was heard in the Archers Court of Canterbury, and, by the decree of the court, the vicar was admonished for having repelled the promoters from the Holy Communion and was admonished to refrain from similar acts in future.

The vicar having obtained a rule nisi for a prohibition to restrain further proceedings in the matter of this decree and monition, the rule was discharged by the divisional court (Bray, J., dissenting).

The Vicar appealed.

The court held that the effect of section 1 of the Act of 1907, was to legalize a marriage with a deceased wife's sister for all purposes and by implication to repeal so much of the statutes of Henry 8 as included a deceased wife's sister within the prohibited degrees; that the proviso in the section was confined to the foregoing substantive enactment of which it was a qualification, and that the only effect of it was to relieve clergymen from liability for refusing to officiate at or aid in any way the performance of such marriages; and that persons who married according to the law of England and who might also have had that marriage solemnized in church could not on that account be treated as notorious evil-livers, or as giving the congregation any ground of offence against them.

Appeal dismissed.—Rex v. Banister, Court of Appeal, 74 London Justice Peace 3.

**Joint Stock Company—Lotteries Act.**—By section 41 of the Lotteries Act, 1823, a person guilty of certain offenses against the act is to be deemed a rogue and vagabond, and to be punished as thereinafter directed. By section 67 the punishment is imprisonment, and for a second offense imprisonment and whipping. Under section 4 of the Summary Jurisdiction Act, 1879, a fine may be imposed instead of imprisonment if the justice of the case will be better met by so doing. By section 2 (1) of the Interpretation Act, 1889, "In the construction of every enactment relating to an offense punishable on indictment or on summary conviction * * * the expression 'person' shall, unless the contrary intention appears, include a body corporate." But the contrary intention sufficiently appears in the sections of the Lotteries Act quoted above, and an incorporated joint stock company cannot be punished in any way under those sections.—Hawke v. E. Hulton & Co. (Limited), (K. B. Div. Ct., March 30), (1909, 2 K. B. 93), 54 Sol. Journal, 162.

**Workmen's Compensation Act, 1906—Accident Happening Abroad.**—Under the Workmen's Compensation Act, 1906, the dependant of a workman who is killed may have a claim to compensation. That claim is a statutory claim, and wholly independent of contract. Therefore, when a workman is killed beyond the territorial limits of the United Kingdom his dependants have a statutory right to compensation or none at all. But (a) prima facie no statute is intended to operate outside the United Kingdom (see Maxwell on the Interpretation of Statutes, p. 213); (b) the act expressly provides (section 7) for the dependants of seamen and apprentices (and not any others) who may be fatally injured elsewhere; and therefore the widow of an English fitter who was killed at Malta by an accident arising out of his employment by an English company cannot recover compensation under the act.—Tomalin v. S. Pearson & Son (Limited), (C. A., March 30), (1909, 2. K. B. 61).

## ENGLISH NOTES.

From London Solicitors' Journal we find something on administration of oaths, which is more or less exemplified in American practice:

The form of the new oath, and the method of administering it, which have been sanctioned by the Lord Chief Justice for use in the courts of the King's Bench division, are given in a letter by Mr. F. A. Stringer to the Times, and are reproduced elsewhere, and no doubt will be generally adopted. As Mr. Stringer usefully points out, there are now really three distinct and concurrent forms of oath: (a) the established ordinary (new) form of oath, which every person administering an oath for any purpose whatever is bound to use unless the person about to be sworn voluntarily objects, and desires some other form; (b) the Scottish form of oath, which must be administered without question to every person who so desires to be sworn (Oaths Act, 1888, section 5); and (c) the statutory right of every person sworn for any purpose whatever to be sworn in any form and manner which he may choose and define, and which he declares to be binding on his conscience (1 & 2 Vict. c. 105).

From this same Journal we excerpt the following:

The House of Lords delivered judgment on the 21st ult., in the case of Amalgamated Society of Railway Servants v. Osborne (Times, December 22nd), and held, affirming the court of appeal, that the respondent (plaintiff) was entitled to succeed in his action, and that the application of the trade union's funds towards payment of members of Parliament was illegal, and must be restrained. The payments had been made under rules of the trade union, which provided for the establishment of a fund "for the maintenance of Parliamentary representation," the important clause being as follows: "All candidates shall sign and accept the conditions of the Labor party, and be subject to their whip;" "the executive committee shall make suitable provision for the registration of a constituency represented by a member or members, who may be candidates responsible to and paid by this society." It was argued that

these rules were ultra vires of the appellants' powers as conferred by the Trade Union Acts, and that, whether ultra vires or not, they were illegal as being against public policy and opposed to the spirit of the constitution. These two arguments may be called the "ultra vires" argument, and the "constitutional" argument. The appeal was heard by Lord Halsbury, Lord Macnaghten, Lord James, Lord Atkinson and Lord Shaw, and the decision of the House, in favor of the respondent, was unanimous, although the reasons for the decision differed. Lords Halsbury, Macnaghten and Atkinson relied on the ultra vires argument. Lord James, who delivered the shortest of the five judgments, would have supported the appellants' case but for the stringent terms of the rule, which required candidates to "sign and accept the conditions of the Labor party and be subject to their Whip." This, he thought, might compel a member of Parliament to forego his own judgment on matters not directly connected with the interests of labor. He was therefore of opinion that "the application of money to the maintenance of a member whose action is so regulated, is not within the powers of a trade union." Lords Macnachten, James and Atkinson all expressly stated that they thought it unnecessary to refer to the "constitutional" argument. Lord Shaw, however, whose judgment is the lengthiest of the five, was so far doubtful as to the right of the respondent to succeed on the ultra vires argument, that he felt compelled to deal with the "constitutional" question, and founded his opinion on that argument entirely.

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Anent President Taft's suggestions about injunctions without notice and the abuse thereof needing a statute for their brief operation, the London Solicitors' Journal comments as follows:

"The object of this legislation is, no doubt, to prevent the abuse of the power to grant injunctions. It is unnecessary to say that no such enactments are required in this country, where the judges may be trusted to exercise their preventive jurisdiction without being too closely fettered by the precise language of sections or rules."

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## JETSAM AND FLOTSAM.

### THE STUDENTS BOX IN ENGLAND.

When Lord Kenyon was Chief Justice of England there used to be a box for the bar students close to the bench, and Lord Campbell says he well remembers how the Chief Justice would show the pleadings to the students and explain their effect. Mr. Justice Jelf has found occasion at Birmingham to express a wish that the students' box were restored in the London courts and introduced into the Assize courts. The practice of reserving a special place for the use of students in our courts of justice was, of course, in existence long before Kenyon's time. Lord Mansfield was always at great pains to state cases for the benefit of students. "There wants nothing to answer the objection but to state the case, which I will do for the sake of the students," are among the words of his reported judgment in a case tried in 1765. An older reference to the practice may be found in Burnet's "History of My Own Time," published in 1682, in which the observant author says: "The judges were wont formerly, in delivering their opinions, to make long arguments, in which they set forth the grounds of law on which they went, which were great instructions to the students and barristers." He would be a bold person who, in these days, when so much is heard of the law's delays, recommended that judges should indulge in "long arguments" for the benefit of students, but nobody can doubt that the students' box might again play a most useful part in the scheme of legal education. It often happens that when an important case is being tried the demands upon the space of the court are so heavy that a student is prevented from enjoying the wished-for opportunity of observing how the masters of the forensic art do their work. The provision of special accommodation for students in the courts would not only enable them to learn the lessons which are to be derived from the combats of the foremost men at the bar in causes celebres, but would also encourage them to make a systematic use of their opportunities of studying the art of advocacy in less sensational cases. The study of abstract propositions of law close packed in text-books and the reading of papers in Chambers are an essential part of the students' training, but an intimate study of the art of advocacy, enabling him to see the legal machinery actually at work, to observe the respective roles in the legal drama played by judge, counsel, solicitor and witness, and to gather the ripe fruit of practical experience, might advantageously be made an integral part of legal education, and nothing is more likely to achieve the desired end than the restoration of the "students" box.—Law Journal (London).

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## CORRESPONDENCE.

### RESPONSIBILITY OF OWNER OF AUTOMOBILE AS A DANGEROUS MACHINE.

Editor Central Law Journal:

In 69 Cent. L. J. 360, there is a discussion of the case of Ingraham against Stockamore, which bears on a case I have in the office. It does not, however, discuss the question whether a man who is running an automobile without a license in violation of a statute, which makes one necessary, can recover if injured through the negligence of another person. This is the exact question which arises in my case and I have found no discussion directly in point, although the Massachusetts case of Dudley against the Street Railway Company, which you cite in the article above referred to is very close. If you know of any decision in which the exact point of my case has been determined, I should be greatly obliged, if you will refer me to it.

Thanking you in advance for this favor. I am

Very truly yours.

JAMES L. DOHERTY.

[Note.—We refer our correspondent to 69 Cent. L. J. 451, where, we think, he will find what he desires in a communication by one of our correspondents, a highly esteemed and successful practitioner at the St. Louis bar.

Editor.]

## BOOKS RECEIVED.

The American State Reports, Containing the Cases of General Value and Authority Subsequent to those Contained in the "American Decisions" and the "American Reports," decided in the courts of last resort of the several states. Selected, reported and annotated, by A. C. Freeman. Volume 128. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1909. Review will follow.

The American and English Encyclopedia of Law and Practice. Editors, William M. McKinney and David S. Garland. Volume II. Northport, Long Island, N. Y. Edward Thompson Company, London, C. D. Cazenove & Son. 1909. Review will follow.

Report of the Thirty-second Annual Meeting of the American Bar Association, held at Detroit, Mich., August 24, 25, 26 and 27, 1909. Baltimore: The Lord Baltimore Press. 1909.

Report of the twenty-first annual meeting of the Virginia State Bar Association, held at The Homestead Hotel, Hot Springs, Va., August 10th, 11th and 12th, 1909. Volume XXII. Edited by John B. Minor of the Richmond Bar. Richmond, Va. Richmond Press, Ind., Printers, 1909.

## HUMOR OF THE LAW.

### MARRIAGE ACCOMPLISHED UNDER DIFFICULTIES.

The late Benjamin F. Wade, at the beginning of his career at the bar, was noted for his bashfulness, mistakenly says an exchange; but another trait, his determination, enabled him to get through his work in a way which, though not conventional, landed him at his destination.

Once, while a youth, he started with a bag of corn on his shoulders to a mill twenty miles away. It was in November, and coming to a full-banked river, he discovered that the canoe was on the other side. Throwing off his clothes he plunged in, gained the canoe, took it back where the bag of corn was, which he ferried across, and then went on his way.

Another illustration of his way of doing things occurred while he was a justice of the peace, which we doubt. One day a young couple called at his office to be married. The presence of four or five irreverent young men prompted the bashful justice to suggest privately to the pair that they had better meet him at the little hotel.

They went, and so did the justice, by a roundabout way, only to discover that the boys were also there. Seeing that he must perform the ceremony in their presence, he, though he had forgotten the usual formula, proceeded to business in the most direct way.

"You wish to be married?" he asked the pair.

"Yes."

"Stand up and take hands. You," addressing ing the not prepossessing groom, "wish to marry this young woman?"

"Yes."

"Of course you do!" exclaimed the justice, glancing at the pretty bride, and asking her, "Do you take this young man for your husband?"

"Yes."

"Well, you are getting the worst of it, but I say you are husband and wife. There, boys, you see I did it!" he concluded, glancing at the spectators.

The couple had to have it explained to them that they were, in the eyes of the law, wedded. Whereupon the husband offered the justice a fee—the statute made it one dollar and a half—which, by a lofty motion of his hand, he waved off, saying, "Nothing for a job like that!"

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Affidavit for "Asalt and Batery." State of Indiana, ——— County, SS.

Before ———————, a justice of the peace in said county, State of Indiana.

vs.

Affidavit for Asalt and Batery.———————

hoos sristen nane Is unoon

——————— being duly sworn on oath says; that ——————— hoos crisshen name is unnoon, late of said county, on or about the first day of July, A. D. 1909 at the county of ———————, State of Indiana, ——— Township, as affiant verily believes Did then and there unlawfully tooch and strike and Wond one ——————— In a Rude and angry Manner.

second Cont

——————— 1 complanes of ——————— and says that the Defendant one the first day of July, 1909, In a Rude Insolent and angry Manner Unlawfully tuched strok Bete and Wanded the plaintiff to his Damage $50.00 Dolers.

contrary to the form of the statutes in such cases made and provided against the peace and dignity of the State of Indiana.

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Subscribed and sworn to before me this 2 day of May, 1909.

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Justis of the Pease.

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Allen Wood, a lawyer of Indianapolis, assisted the Indiana Republican State Committee during the campaign last year. One evening, after making out a route card, he called on some very attractive young ladies who had moved to Indianapolis from the part of the State he was about to invade on a speaking jaunt. He had noticed on the map the name of a town bearing the family name of the young ladies, and, on inquiry from them, learned the town had been named for their father. "Well," said Wood, "I think I had better stop off there and make a speech while in the neighborhood." "It will scarcely be worth your while," replied one. "I don't believe there are thirty people in the whole town. It is merely a cross-roads station. When we moved away a creamery was started in the very house in which we had lived." "How ill considered," exclaimed Wood, "to start a creamery when the peaches were all gone."

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The late Judge Silas Bryan, the father of William J. Bryan, once had several hams stolen from his smokehouse. He missed them at once, but said nothing about it to anyone. A few days later a neighbor came to him.

"Say, judge," he said, "I heard yew had some hams stole t'other night."

"Yes," replied the judge very confidentially, "but don't tell anyone. You and I are the only ones who know it."—Success Magazine.

## WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.**



1. **Acknowledgment** — Ground of Impeachment.—While, as between the parties, the certificate of acknowledgment of a deed may be impeached for fraud or collusion, the evidence must be clear and satisfactory, and it cannot be impeached by the grantor's unsupported testimony. Kosturska v. Bartkiewicz. Ill., 89 N. E. 657.

2. **Adverse Possession**—Attornment.—Where a landlord is in adverse possession through a tenant, his possession is not destroyed by the tenant's attornment to a stranger.—Saxton v. Corbett, Tex., 122 S. W. 75.

3. ——Color of Title.—Possession continued by successive grantees inures to the benefit of a subsequent grantee claiming thereunder, and is availabl to him in establishing a prescriptive title.—Hassam v. Safford, Vt., 74 Atl. 197.

4.——Statute of Limitations.—The five-year statute of limitation does not protect one claiming under a deed from an individual where he does not show the date of the recording of the deed.—Haring v. Shelton, Tex., 122 S. W. 13.

5. **Appeal and Error**—Review of Facts.—Concurrent findings of fact by two lower courts in support of a claim of a native of the Philippines to have held possession of certain mines down to the bringing of the action will not be disturbed by Supreme Court of the United States on anneal from Supreme Court of the Phillipine Islands.—Reavis v. Fianza, U. S. S. C., 30 Sup. Ct. 1.

6. **Attachment**—Intervention by Seller.—The seller, after giving notice of the exercise of his right of stoppage in transitu, may interplead in attachment proceedings by a creditor of the buyer.—Letts-Spencer Grocer Co. v. Missouri Pac. Ry. Co., Mo., 122 S. W. 10.

7. **Attorney and Client**—Authority to Compromise.—An attorney in a divorce action is without authority to compromise by accepting a less amount of alimony than awarded by the decree in satisfaction thereof without express authority of his client, and such a compromise is voidable at the client's option.—Sebastian v. Rose, Ky., 122 S. W. 120.

8.——Misconduct of Attorney.—It is the duty of complainant's attorney in a divorce case to disclose to the chancellor a prior adjudication dismissing a like bill for want of equity.—People v. Case, Ill., 89 N. E. 638.

9. **Bankruptcy**—Contempt.—Disobedience of referee's order by a bankrupt to justify an order of commitment must be proved beyond a reasonable doubt.—In re Mize, U. S. D. C., N. D. Ala., 172 Fed. 945.

10.——Discharge.—Creditors who had actual notice of the judication of their debtor in bankruptcy, and in the steps taken in the proceedings, were found to present their claim, though they were not mentioned as creditors, and their claim was barred by the discharge, though never presented.—Dycus v. Brown, Ky., 121 S. W. 1010.

11.——Discharge.—Where a bankrupt obtained property within four months prior to bankruptcy on the faith of a false financial statement its date was not material to the creditor's right to prevent a discharge.—In re Terens, U. S. D. C., E. D. Wis., 172 Fed. 938.

12. **Banks and Banking**—Dissolution.—A banking corporation may prosecute its suit to final judgment for the purpose of closing up its affairs, though it goes into voluntary liquidation pending the litigation.—Commercial Loan & Trust Co. v. Mallers, Ill., 89 N. E. 661.

13.——Misapplication of Funds.—Willful misapplication of the funds of a national bank, in order to constitute an offense, must be with intent to injure or defraud the bank or some other person, and is not maladministration.—United States v. Steinman, U. S. C. C. of App., Third Circuit, 172 Fed. 913.

14. **Benefit Societies**—Proofs of Death.—A beneficial insurance order waived its right to insist on proofs of death, as a condition precedent to beginning suit on a certificate, where it refused to receive proofs of death based on absence on which the beneficiary relied.—Miller v. Sovereign Camp Woodmen of the World, Wis., 122 N. W. 1126.

15. **Bills and Notes**—Bona-fide Purchasers.—A failure of the consideration for drafts as between the drawer and drawee would not affect the right of a bona-fide purchaser of the drafts for value before maturity, without notice thereof, to recover thereon against the drawee.—Smith Bros. v. Flanders, Tex., 122 S. W. 80.

16.——Consideration.—If in an action on a note the pleader unnecessarily alleges a consideration it must be proved.—Bronston's Adm'r v. Lakes, Ky., 121 S. W. 1021.

17.——Innodent Purchaser.—Where plaintiff was an innocent purchaser for value of drafts given by defendant in payment for goods sold through fraud, but obtained knowledge of the fraud and of defendant's refusal to pay for them before maturity, defendant could set up the fraud as a defense in an action thereon by plaintiff only as to such drafts as matured when plaintiff had in its possession funds of the draw-

er sufficient to pay them.—Johnson County Sav. Bank v. Renfro, Tex., 122 S. W. 37.

18.——Right of Action.—That the payee of a promissory note was also one of the makers would not prevent his maintaining an action at law thereon.—O'Day v. Sanford, Mo., 122 S. W. 3.

19. **Boundaries**—Evidence.—In a suit involving the location of a boundary line, evidence of adverse possession is competent to show the true location of the line.—Stark v. Duhring, Wis., 122 N. W. 1131.

20.——Possession of Part of Tract. — Where the boundaries of a lot were clearly marked, possession of plaintiff, through his tenants, of a part of the lot, perfected title by limitation to the well-defined limits of the whole lot.—Washam v. Harrison, Tex., 122 S. W. 52.

21.——Riparian Rights.——The owner of land abutting on the meandered line of a lake has prima facie title to the center of the lake.—Johnson & Burr v. Elder, Ark., 121 S. W. 1066.

22. **Burglary**—What Constitutes.—Pen. Code 1895, art. 841, held to be an addition to articles 848 and 839, and under the three articles burglary is committed by discharging firearms into a house with intent to injure the person therein; the intent not necessarily being to commit a felony.—Railey v. State, Tex., 121 S. W. 1120.

23. **Cancellation of Instruments**—Undue Influence.—Allegation that a deed was obtained by fraud will not support a claim that it was executed through undue influence.—Kosturska v. Bartkiewicz, Ill., 89 N. E. 657.

24. **Carriers**—Live Stock Shipment.—The crowded condition of the stock yards at its terminus held not to excuse a railroad company from liability for negligence in handling a shipment of cattle.—Texas & P. Ry. Co. v. Henson, Tex., 121 S. W. 1127.

25.——Place of Delivery.—A railroad contracting to haul logs held required to deliver the logs in accordance with the custom established prior to the execution of the contract and continued subsequently.—Gates v. Detroit & M. Ry. Co., Mich., 122 N. W. 1078.

26.——Scope of Employee's Authority. — A brakeman on a freight train has at least prima facie authority to eject a trespasser so as to make the company liable for his negligence or wantonness in doing so.—Golden v. Northern Pac. Ry. Co., Mont., 104 Pac. 549.

27.——Stoppage in Transitu.—The right of stoppage in transitu is merely an extension of the seller's lien for the payment of the purchase money.—Letts-Spencer Grocer Co. v. Missouri Pac. Ry. Co., Mo., 122 S. W. 10.

28. **Charities**—Gifts.—In determining whether a gift is charitable, the courts will not look to the donor's motives in making it, but rather to the nature and purpose of the gift.—In re Graves Estate, Ill., 89 N. E. 672.

29. **Constitutional Law**—Equal Protection.—Where all persons who are in like circumstances are treated under the laws the same, there is no deprivation of the equal protection of the law.—Board of Com'rs of Johnson County v. Johnson, Ind., 89 N. E. 590.

30.——Public Service Corporation.—To compel a public service corporation to discharge its public duties can in no case amount to a taking without due process of law.—Hatch v. Consumers' Co., Idaho, 104 Pac. 670.

31. **Contracts**—Action for Breach.—A recovery of the fee, under a contract requiring annual prepayment of a membership fee, cannot be had on a count on book account, or on the common counts; but plaintiff should declare specifically on the contract.—Massachusetts Collecting & Rating Agency v. Cerudelli, R. I., 74 Atl. 177.

32.——Cancellation.—The doctrine permitting the cancellation of conveyances made in consideration of promises to support and care for the grantors in the future when the grantees fail to perform does not apply to ordinary bargains and business transactions for gain.—Miller v. Sutliff, Ill., 89 N. E. 651.

33.——Conditional Acceptance.—Though plaintiff's acceptance of an offer was conditional, the contract was complete if both parties subsequently treated it as existing in accordance with the acceptance.—General Lithographing & Printing Co. v. Washington Rubber Co., Wash., 104 Pac. 650.

34.——Consideration.—A sale of public land, title to which is in the state, is not a consideration for the promise to pay another therefor.—Samples v. Wever, Tex., 121 S. W. 1129.

35.——Illegality.—The defense of illegality of a contract relied on may be raised by either party thereto, but cannot be invoked by a third person.—Owens v. Davenport, Mont., 104 Pac. 682.

36.——Implied Terms.—The terms of a contract may be express or implied from acts, but there must be in either case a distinct intention common to both parties.—Blake v. Scott, Ark., 121 S. W. 1054.

37.——Limitation in Contract.—The bar of a contract limitation must be specially pleaded the same as the general statute of limitations.—Helmer v. Title Guaranty & Surety Co. of Scranton, Pa., Wash., 104 Pac. 783.

38. **Corporations**—Contract of Promoters.—Contract of promoters of a corporation formed by consolidation to retain an officer as a paid officer of the new corporation held binding on it until disapproved by its directors.—Girard v. Case Bros. Cutlery Co., Pa., 74 Atl. 201.

39.——Fraud.—Acts of persons in appropriating earnings of a corporation held constructive fraud as to a cestui que trust of one of the persons to whom stock of the corporation had been issued under a decree of court, and who had been directed to pay the cestui que trust's pro rata shares of the earnings of the corporation.—Allen v. Hutcheson, Tex., 121 S. W. 1141.

40.——Subscriptions.—A subscription to stock of a corporation to be formed for the purposes of acquiring and carrying on a "general produce and merchandise business," etc., held not to bind subscribers to take stock in a corporation formed not only for such purposes, but also for dealing in real estate, bonds and mortgages.—Hanford Mercantile Store v. Sowlveere, Cal., 104 Pac. 708.

41.——Torts of Agents.—A corporation is not liable for the slanderous utterance of its servants, unless the actionable words were spoken by its express consent, direction, or authority or were ratified by it.—Duquesne Distributing Co. v. Greenbaum, Ky., 121 S. W. 1026.

42.——Transfer of Stock.—A purchaser of corporate stock, having a property right therein, had the right to demand certificates therefor, which, under the law by agreement, the corporation was required to furnish, and could enforce his right without reference to the lapse of time if no loss or injury had resulted to an innocent

person by reason of delay.—Cortelyou v. Imperial Land Co., Cal., 104 Pac. 695.

43. **Courts**—Encroachment on Legislature.—A court held authorized to inquire into the validity of an ordinance of a legislative body when an attempt to enforce it is made or threatened to the injury of the personal or property rights of the citizen.—Smith v. City of Centralia, Wash., 104 Pac. 797.

44. **Covenants**—Breach.—That a grantor of an undivided interest in a deed containing a covenant of warranty acquired his interest after the mortgage under which a remote grantee was evicted had been given held of no consequence in an action for breach of covenant.—Williams v. O'Donnell, Pa., 74 Atl. 205.

45.——Discharge.—A contract of warranty contained in a deed of real estate involves a personal obligation on the part of the grantor to which the grantee has a right, and which cannot be denied him or switched to another without his consent.—Smith v. Pitts, Tex., 122 S. W. 46.

46. **Criminal Law**—Intoxicating Liquors.—A conviction for selling liquor in violation of a local option law held no bar to a conviction for violating a city ordinance making the unlawful carrying on of a liquor business in a city a nuisance.—Mayhew v. City of Eugene, Or., 104 Pac. 727.

47.——New Trial.—Evidence simply of an impeaching character is not such newly discovered evidence as will warrant a new trial.—Morris v. State, Tex., 121 S. W. 1112.

48. **Criminal Trial**—Modification of Sentence.—A sentence will be modified on appeal by reversal of the part imposing a cruel and unusual punishment.—State v. Ross, Or., 104 Pac. 596.

49. **Damages**—Exemplary Damages.—Exemplary damages cannot be recovered unless the plaintiff sustained actual damages.—Thuron v. Skirvin, Tex., 122 S. W. 55.

50.——Married Women.—Where a married woman is a housekeeper, it is not necessary to prove her earning power to entitle her to recover damages for permanent injuries.—City of Louisville v. Tompkins, Ky., 122 S. W. 174.

51.——Mental Anguish.—To recover damages under the mental anguish doctrine, it is necessary that the mental anguish suffered be real and with cause.—Western Union Telegraph Co. v. Archie, Ark., 121 S. W. 1045.

52.——Right to Recovery.—Where defendant has been guilty of no actionable wrong, no damages can be recovered from him, either compensatory or by way of example.—Freund v. Murray, Mont., 104 Pac. 683.

53. **Death**—What Law Governs.—The rights of the parties to an action for wrongful death must be determined in accordance with the law of the state where the injury occurred.—St. Louis, I. M. & S. Ry. Co. v. Corman, Ark., 122 S. W. 116.

54. **Deeds**—Construction.—The words "children" and "issue" in a deed are not to be given the meaning of "heirs," when to do so would defeat the lawful intention of the grantor.—Hopkins v. Hopkins, Tex., 122 S. W. 15.

55.——Construction.—Where the conduct of the grantor indicates that he intended to give effect to the deed and to relinquish all control of it, the law will give it effect accordingly, and will hold that there has been a delivery.—McComb v. McComb, Ill., 89 N. E. 714.

56.——Delivery.—A transfer of a fee-simple estate, subject to a life estate in the grantor, held effected by a deed delivered by the grantor to a third person, with instructions to deliver it to the grantee at the grantor's death.—Moore v. Trott, Cal., 104 Pac. 578.

57. **Descent and Distribution**—Rights of Expectant Heirs.—There is no rule of law which requires a parent to distribute property equally among his children; but he may prefer one and cut off another with or without any reason.—McLaughlin v. McLaughlin, Ill., 89 N. E. 645.

58. **Divorce**—Alimony.—Alimony or maintenance is not granted as a matter of course upon a mere allegaion of marriage, being imposed to compel the performance of a duty, and not as a penalty, and can only be awarded on equitable grounds in view of the situation of the parties.—State v. Superior Court of King County, Wash., 104 Pac. 771.

59.——Granting on Consent of Parties.—A divorce will not be granted on consent of parties, but a cause must be proved to the court's satisfaction, independently of either party's fault or confession.—People v. Case, Ill., 89 N. E. 638.

60. **Domicile**—General Rule Governing.—The general rule is that a man must have a habitation somewhere, and that he can have but one, and that in order to lose one he must acquire another.—Miller v. Sovereign Camp Woodmen of the World, Wis., 122 N. W. 1127.

61. **Drains**—Notice of Repairs.—Ordinary repairs of a drainage ditch may be made without notice to interested property owners.—In re Renville Co., Minn., 122 N. W. 1120.

62. **Easements**—Establishment.—The granting of a right of way and its acceptance by proper authority and in a proper manner will be presumed from an uninterrupted adverse user for 15 years.—City of Louisville v. Tompkins, Ky., 122 S. W. 174,

63. **Ejectment**—Strength of Defendant's Title.—Where the defendant in ejectment show prima facie title, plaintiff must overcome such title and show title in himself, as he can only rely on his own title.—Maney v. Burke, Ark., 122 S. W. 111.

64. **Estoppel**—Specific Performance.—Where a clerical error in a contract is recognized by the parties thereto in an action at law thereon, the question of error in the contract was foreclosed in a subsequent suit for specific performance.—Gates v. Detroit & M. Ry. Co., Mich., 122 N. W. 1078.

65. **Evidence**—Matters of Common Knowledge.—A court cannot pretend to be ignorant of facts as to a strike of employees in a large city within its jurisdiction, which are common to the knowledge of every intelligent person within the county.—Connett v. United Hatters of North America, N. J., 74 Atl. 188.

66.——Objections by Party Introducing. — A party who introduced witnesses, while not bound by their testimony, cannot insist that they are unworthy of belief, and, unless their testimony is self-contradictory or inherently improbable, it cannot be disregarded.—United States v. Barber Lumber Co., U. S. C. C., D. Idaho, 172 Fed. 948.

67.——Parol Evidence Affecting Writing.—An oral promise by the payee to the surety on a note, when executed, not to enforce its payment against him, does not affect the surety's obligation.—Eambro v. Keith, Tex., 122 S. W. 40.

68.——Parol Evidence.—A joint maker of a

note cannot change it by parol evidence to the effect that the payee had told him that he had nothing to do with the note, but that it would be taken care of.—Lipsett v. Hassard, Mich., 122 N. W. 1091.

69.——Truth of Testimony.—A party calling a witness does not vouch for the truth of his testimony.—Lewis v. Wabash R. Co., Mo., 121 S. W. 1090.

70.——Value of Property.—Evidence of the price paid for property is not evidence of its market value.—Texarkana & Ft. S. Ry. Co. v. Neches Iron Works, Tex., 122 S. W. 64.

71.——Warehouse Receipt.—A warehouse receipt issued by a warehouseman held a contract fixing the rights of the parties, and not to be varied by parol in the absence of an averment of fraud or mistake.—Offutt & Blackburn v. Doyle, Ky., 122 S. W. 156.

72.——Weight.—Statement of a witness that he did not hear an engine bell at a crossing, with no accompanying facts, is of no value as evidence, but attending circumstances may make the statement strong affirmative evidence.—Slattery v. New York, N. H. & H. R. Co., Mass., 89 N. E. 622.

73. **Exchange of Property**—Pleading.—Where defendant, in an action to set aside a deed, in addition to the general denial, specially pleaded plaintiff's ratification of the transaction, the burden was upon defendant to establish the ratification.—Koppe v. Koppe, Tex., 122 S. W. 68.

74. **Exemptions**—Time for Claim.—While a judgment debtor may waive his exemption, the statute does not require him to notify the sheriff before the execution sale or before the execution of the indemnity bond that he claims the property as exempt.—Winstead v. Hicks, Ky., 121 S. W. 1018.

75. **False Imprisonment**—Probable Cause.—While a person who procures a warrant may be liable to an action for malicious prosecution if he acts maliciously and without probable cause, he is not liable to an action for false imprisonment.—Campbell v. Hyde, Ark., 122 S. W. 99.

76. **Fire Insurance**—Ownership Clause.—A fire policy held not avoided by its sale and unconditional ownership clause; the insurer's agent having been told by insured of his conditional ownership of some of the property.—Miller v. Prussian Nat. Ins. Co., Mich., 122 N. W. 1093.

77. **Forcible Entry and Detainer**—Civil Liability.—It is not competent to try title in forcible entry, but in whom the legal title was vested at the time of entry is necessary to be ascertained, where on that alone depends the question whether plaintiff was in actual possession when defendant entered.—Richi v. Owsley, Ky., 121 S. W. 1015.

78. **Franchises**—Term.—A franchise granted to a corporation, without limitation as to term, held limited to the life of the corporation.—People v. Economy Light & Power Co., Ill., 89 N. E. 760.

79. **Guaranty**—Original Obligation. — Defendant's agreement to assume payment of a catalogue, which plaintiff had contracted with another to print held an original obligation, and not a guaranty.—General Lithographing & Printing Co. v. Washington Rubber Co., Wash., 104 Pac. 650.

80. **Habeas Corpus**—Custody of Child.—The father of a child has the first claim to its custody, unless he has abandoned it, is incapable to care for it, or there is some strong reason for denying his right.—Orey v. Molder, Mo., 121 S. W. 1102.

81. **Homestead**—Option Contract.—A wife's homestead declaration, made subsequent to the husband's option to convey the property to plaintiff on plaintiff's demand, held subject to such option, and no defense to plaintiff's suit for specific, performance.—Smith v. Bangham, Cal., 104 Pac. 689.

82. **Improvements**—Set Off Against Rent.—At common law, the true owner of land held entitled to enter thereon and own the improvements placed thereon by a bona fide possessor, while equity required the value of the permanent improvements to be offset against the owner's claim for rents and profits.—McDonald v. Rankin, Ark., 122 S. W. 88.

83. **Injunction**—Interference With Contract by Third Person.—A contract between an employer and its employees that the latter shall not join a labor union and that the employer shall not employ union men is valid, and a combination between officers or members of a labor union to induce a violation of such a contract is an unlawful conspiracy, the carrying out of which may be enjoined.—Hitchman Coal Co. v. Mitchell, U. S. C. C., N. D. W. Va., 172 Fed. 963.

84.——Ordering and Encouraging Strikes.—The principle that every man is bound by his own acts applies to acts by labor unions in ordering a strike and encouraging its continuance, and they must be held accountable for all results properly traceable to their original action.—Connett v. United Hatters of North America, N. J., 74 Atl. 188.

85. **Judicial Sales**—Void Decree.—A sale under a void decree confers no title, and the purchaser, though a stranger to the suit, is not an innocent purchaser so as to acquire title.—McDonald v. Rankin, Ark., 122 S. W. 88.

86. **Landlord and Tenant**—Adverse Possession.—A lease of land in possession of the alleged tenant and the execution of a note for the rent held void, where the tenant was then the owner of the land by adverse possession.—Johnson & Burr v. Elder, Ark., 121 S. W. 1066.

87. **Libel and Slander**—Comment on Public Matters.—The public conduct of public men is properly subject to legitimate discussion.—Lawrence v. Herald Pub. Co., Mich., 122 N. W. 1084.

88.——Damages.—When a mercantile agency is charged as for a libel, it must appear, when the words relied on are not libelous per se, that some pecuniary loss has been sustained.—Denney v. Northwestern Credit Ass'n, Wash., 104 Pac. 769.

89. **Limitation of Actions**—New Cause of Action.—Where a declaration stated a cause of action defectively, an amendment curing the defects was not subject to limitations as stating a new cause of action.—Lee v. Republic Iron & Steel Cos., Ill., 89 N. E. 655.

90. **Lis Pendens**—Title Acquired.—The doctrine of lis pendens applies to purchasers or others acquiring title from a party to a pending action, and generally does not apply to strangers to the suit.—McDonald v. Rankin, Ark., 122 S. W. 88.

91. **Mandamus**—Inspection of Corporate Books.—The remedy of a stockholder, denied permission to inspect the corporate books, held to be by mandamus, and not by mandatory injunction.—Brown v. Crystal Ice Co., Tenn., 122 S. W. 84.

92. **Marriage**—Nature of Relation.—In Christian nations, marriage is not a mere contract to be suspended or dissolved at pleasure, but rather a status based on public necessity and controlled by law for the benefit of society at large.—People v. Case, Ill., 89 N. E. 638.

93. **Master and Servant**—Assumed Risk.—A trainman knowing of obstruction maintained by the railroad near track does not assume the risk.—Louisville & N. R. Co. v. Hahn's Adm'r,, Ky., 122 S. W. 142.

94.——Assumption of Risk.—A master need not instruct a servant, 14 years old, and possessing average intelligence, concerning a danger appreciated by him.—Cronin v. Columbian Mfg. Co., N. H., 74 Atl. 180.

95.——Contributory Negligence.—Contributory negligence of a plaintiff, in an action against his employer for a personal injury held not established as matter of law by the testimony of an expert witness.—Carter, Rice & Co. v. Aubin, U. S. C. C. of App., First Circuit, 172 Fed. 916.

96.——Correlative Rights.—The employer and employee have correlative rights, which appear in our constitution in the clause "among which are those of enjoying and defending life and liberty," etc., and there is no law applicable to one that does not apply to the other with equal force.—Connett v. United Hatters of North America, N. J., 74 Atl. 188.

97.——Instructions as to Danger.—An employee of an independent contractor injured by coming in contact with an electric wire could not complain of the electric light company for failure to instruct him as to the danger.—Myers v. Edison Electric Illuminating Co., Pa., 74 Atl. 223.

98.——Safe Place to Work.—If defendant knew of the danger in sending an employee under an oil tank car to unscrew the nipple of the pipe when the valve was open, so as to permit the oil to rush out when the nipple was removed, but the servant did not know of the danger and could not discover it, defendant would be liable for resulting injuries.—Galveston H. & S. A. Ry. Co. v. Sanchez, Tex., 122 S. W. 44.

99. **Mines and Minerals**—Ejectment by Lessee.—Ejectment held obtainable by an oil and gas lessee, though he had not entered into possession, against a third person claiming adversely to lessor.—Barnsdall v. Bradford Gas Co., Pa., 74 Atl. 207.

100. Representation Work.—The representation work required by federal statutes to preserve mining claims may be done on the claims themselves, on a group of contiguous claims, or on adjacent patented or public land.—Copper Mountain Mining & Smelting Co. v. Butte & Corbin Consol. Copper & Silver Mining Co., Mont., 104 Pac. 540.

101. **Mortgages**—Property Subject.—A purchaser in possession of real estate under a contract of sale has an interest which may be mortgaged.—Scott v. Farnam, Wash., 104 Pac. 639.

102.——Redemption.—Where a purchaser of a judicial sale has by a course of conduct induced the owner to refrain from redeeming within the period of redemption by fraudulent representations or promises which would not constitute a contract, equity will grant relief.—Ogden v. Stevens, Ill., 89 N. E. 741.

103. **Municipal Corporations**—City Ordinances.—Where an act is prohibited by state law, a city ordinance previously in force cannot be invoked to permit the same act.—Mayhew v. City of Eugene, Ore., 104 Pac. 727.

104.——Contributory Negligence.—A traveler's failure to observe an obstruction in a street by which she was thrown from her wagon and injured held not contributory negligence as a matter of law.—City of Louisville v. Tompkins, Ky., 122 S. W. 174.

105.——Use of Streets.—The public will not be heard in equity to complain of an abutting owner's act, which does not unreasonably interfere with the public's use of a street for travel.—Pickrell v. City of Carlisle, Ky., 121 S. W. 1029.

106.——Vacating Part of Street.—An owner of property abutting on a street, a part of which is vacated, held to suffer special injury entitling him to sue to set aside the vacation.—Smith v. City of Centralia, Wash., 104 Pac. 797.

107. **Navigable Waters**—Burden of Proof.—One claiming that a stream is navigable is not bound to show that it is navigable in its entirety, or that the navigable portion is open for navigation during the whole year.—People v. Economy Light & Power Co., Ill., 89 N. E. 760.

108. **Negligence**—Joint and Several Liability.—Where the negligence of two contributes to an injury, one may not escape liability on the ground that the other is also liable.—Tebow v. Wiggins Ferry Co., Ill., 89 N. E. 658.

109.——Pleading.—Where a complaint for negligence shows that an act of plaintiff was the proximate cause of the injury, it must allege plaintiff's freedom from negligence.—Badovinac v. Northern Pac. Ry. Co., Mont., 104 Pac. 543.

110.——Proximate Cause.—Where the circumstances concurring with the negligent act might reasonably have been foreseen, the master guilty of such negligent act held liable.—Stehle v. Jaeger Automatic Mach. Co., Pa., 74 Atl. 215.

111. **Parties**—Bringing in Additional Parties. The court has inherent power to require additional parties to be brought in.—In re Clerf, Wash., 104 Pac. 622.

112. **Partition**—Suit in Equity.—A partition suit which deals with equitable interests is in equity, and a court of chancery has jurisdiction notwithstanding the statutory remedy in partition.—Coffman v. Gates, Mo., 121 S. W. 1078.

113. **Partnership**—Action by Partner. — One partner may not sue another at law except for personal torts having no relation to the partnership.—Freund v. Murray, Mont., 104 Pac. 683.

114.——Deed to Partnership.—A deed to a partnership in its firm name, when the purchase was by the partners individually, held not void in equity, but subject to correction.—Spaulding Mfg. Co. v. Godbold, Ark., 121 S. W. 1063.

115.——Judgment in Name of Partnership.—A judgment in the name of a partnership, objection not having been made before judgment, held not void.—Spaulding Mfg. Co. v. Godbold, Ark., 121 S. W. 1063.

116.——Torts of Agent.—A partnership is not liable for the slanderous utterance of its servants unless the actionable words were spoken by its express consent, direction, or authority, or were ratified by it.—Duquesne Distributing Co. v. Greenbaum, Ky., 121 S. W. 1028.

117. **Payment**—Discharge of Debt.—The obligor's intention is important in determining the question whether obligations have or have not been extinguished by payment.—Fisher v. City of Seattle Wash., 104 Pac. 655.

118. **Physicians and Surgeons**—Malpractice.—In an action against a physician for malpractice, plaintiff is not entitled to recover smart money.—Helland v. Bridenstine, Wash., 104 Pac. 626.

119. **Pleading**—Construction.—While on demurrer and before judgment, pleadings are strictly construed against the pleader, after verdict or judgment they are liberally construed to sustain the judgment, and merely formal defects will be held cured.—Winstead v. Hicks, Ky., 121 S. W. 1018.

120. **Principal and Agent**—Employment of Agent.—A contract whereby a manufacturer appointed one its exclusive agent for the sale within a specified territory of its product held not to prevent the manufacturer from making sales in the territory on the payment of commissions thereon.—Clairmonte v. Napier Motor Co. of America, Cal., 104 Pac. 712.

121. **Principal and Surety**—Extension of Time

for Payment.—An extension of time for payment of a note, on consideration that the maker would pay interest accruing, held to release the surety.—Fambro v. Keith, Tex., 122 S. W. 40.

122. **Prohibition**—Jurisdiction.—Want of jurisdiction is an insufficient ground for the issuance of a writ of prohibition if there be a plain, speedy and adequate remedy at law.—Burge v. Justices' Court of City & County of San Francisco, Cal., 104 Pac. 581.

123.——Nature of Remedy.—At common law the writ of prohibition prevents excess or usurpation of jurisdiction, and prohibition may not be resorted to when the ordinary remedies by appeal, writ of review, certiorari, or injunction, or other modes of review, are available. —State v. Durant, Utah, 104 Pac. 760.

124. **Public Lands**—Survey.—A mistake in a government survey of a lake may be corrected. —Johnson & Burr v. Elder, Ark., 121 S. W. 1066.

125. **Railroads**—Injury to Alighting Passenger.—Where a train was stopped for a reasonable time to afford the passengers an opportunity to alight in safety, the trainmen in starting the train could assume that a passenger had availed herself of the opportunity with reasonable promptness.—Chicago, B. & Q. R. Co. v. Lampman, Wyo., 104 Pac. 533.

126.——Injury to Person Near Track.—A railroad company held not required to load or inspect its car to prevent coal falling from it on one playing on its grounds near the track —Covington & C. R. Transfer & Bridge Co. v. Mulvey's Adm'r, Ky., 122 S. W. 129.

127. **Religious Societies**—Governmental Powers.—The Presbyterian Church consists of members and officers, and its governmental power comes, not from the people, but from the Divine Founder of the Christian religion, which power is vested in church officers, organized into church courts, acting in accordance with a written constitution.—Ramsey v. Hicks, Ind., 89 N. E. 597.

128. **Sales**—Performance.—One selling a machine need not, in an action for its price, show that any of the parts of the machine were perfect, it being sufficient that they were of fair ordinary quality as compared with the parts of other machines of that kind.—Fuchs & Lang Mfg. Co. v. R. J. Kittredge & Co., Ill., 89 N. E. 723.

129. **Set-off and Counterclaim**—Action on Indemnity Bond.—In an action by an execution debtor on an indemnity bond given the sheriff for damages for the levy on and sale of exempt property, it was error to adjudge that the damages be set off by the amount of the original judgment.—Winstead v. Hicks, Ky., 121 S. W. 1018.

130. **Specific Performance**—Contracts Enforceable.—Specific performance of a contract will not be enforced, unless its terms are clear. —McKennan v. Mickelberry, Ill., 89 N. E. 717.

131.——Option Contract.—In a suit to compel specific performance of a contract to convey land pursuant to an option, the adequacy of the consideration paid for the option was immaterial.—Smith v. Bangham, Cal., 104 Pac. 689.

132.——Sale of Land.—The general rule is that the sufficiency of an abstract of title on a bill for specific performance by a purchaser is to be determined as of the date fixed by the contract, or by agreement of the parties, when vendor was to furnish the abstract and the deal was to be closed, and not at some time subsequent to filing the bill.—Smith v. Hunter, Ill., 89 N. E. 686.

133. **Statutes**—Repeal by Implication.—Repeals of statutes by implication may not be worked piecemeal.—State v. Mitchell, Wash., 104 Pac. 791.

134.——Repeal by Inadvertence.—The theory of repeal by inadvertence is not to be considered if, by the application of any rule of construction, another result may be arrived at.— City of Los Angeles v. Lelande, Cal., 104 Pac. 717.

135. **Street Railroads**—Time to Alight.—A car having been stopped in response to a passenger's signal to alight, the operatives should exercise care not to start it until assured that no person was in the act of alighting.—Groshong v. United Rys. Co. of St. Louis, Mo., 121 S. W. 1084.

136. **Telegraphs and Telephones**—Commercial Messages.—Where a message relates to a commercial business, the telegraph company has notice of any actual damages that may result from its negligence.—Western Union Telegraph Co. v. Askew, Ark., 122 S. W. 107.

137.——Delay in Delivery.—Prolongation of anxiety on delivery of a message informing a daughter of her father's fatal illness held not a basis for damages.—Goodhue v. Western Union Telegraph Co., Tex., 122 S. W. 41.

138.——Injury from Broken Wires.—Telephone company held not liable to pedestrian injured by coming in contact with one of its wires which had broken in a storm, and had become charged with electricity from an electric light wire.—Stark v. Pennsylvania Telephone Co., Pa., 74 Atl. 222.

139.——Regulation of Business.—A telegraph company may prescribe reasonable rules for its business, and reasonable hours during which messages may be sent and delivered at certain offices.—Western Union Telegraph Co. v. Harris, Ark., 121 S. W. 1051.

140. **Trespass to Try Title**—Adverse Possession.—In trespass to try title, held not error to assume that possession was adverse.—Washam v. Harrison, Tex., 122 S. W. 52.

141. **Trial**—Special Verdict.—Where a special verdict submitted covered the issues precisely, the court was justified in refusing to submit any other questions.—Monture v. Regling, Wis., 122 N. W. 1129.

142. **Trover and Conversion**—Burden of Proof. —Defendant in trover claiming on account of his good faith a modification of the rule as to damages has the burden of showing that he was in fact an innocent converter.—Hassam v. Safford, Vt., 74 Atl. 197.

143.——Measure of Damages.—The general measure of damages for conversion of property is its market value at the time and place of conversion, with legal interest.—Texarkana & Ft. S. Ry. Co. v. Neches Iron Works, Tex., 122 S. W. 64

144. **Trusts**—Resulting Trusts.—Where a widow and heirs purchased certain land at a partition sale by receipting to master for one-third of the bid, they took title in trust for those entitled to the property under their ancestor's will.—Worrell v. Torrance, Ill., 89 N. E. 693.

145. **Vendor and Purchaser** — Recording of Mortgage.—The recording of a mortgage executed by a purchaser in possession under the contract of sale held notice to any subsequent purchaser of the vendor of the mortgagee's right to purchase under the contract.—Scott v. Farnam, Wash., 104 Pac. 639.

146.——Title of Vendor.—A court of chancery will not force on a purchaser a title clouded with substantial defects, or one that he may be required to engage in litigation to defend, or one that he cannot easily dispose of by reason of defects therein.—Smith v. Hunter, Ill., 89 N. E. 686.

147. **Venue**—Transitory Action.—An action to enforce a trust in real and personal property held transitory, and not local.—State v. Superior Court of Pierce County, Wash., 104 Pac. 607.

148. **Waters and Water Courses**—Public Water Supply.—A corporation accepting a franchise from a municipality to supply its inhabitants with water held to impliedly contract to serve all.—Hatch v. Consumers' Co., Idaho, 104 Pac. 670.

149. **Wills**—Foreign Wills.—An authenticated copy of a will probated in a foreign jurisdiction held not to be first probated in the county court in West Virginia before it is offered as evidence in the circuit court in an appellate proceeding.—In re Rumford's Will, W. Va., 66 S. E. 10.

150. **Witnesses**—Credibility.—That a witness in a criminal case is to be paid a reward in the event of the conviction of the defendant may affect his credibility, but does not render him incompetent.—Union v. State, Ga., 66 S. E. 24.